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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

No. .....

BELLINGHAM FROZEN FOODS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

Did Petitioner, who purchased the assets of a bankrupt employer and engaged in the same type of business as the bankrupt, become a successor employer, required to recognize and bargain with the labor organization which represented the employees of the bankrupt, even though Petitioner, through non-discriminatory hiring decisions, did not hire a majority of its full complement of employees from the ranks of the bankrupt's employees?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement of the Case	3
Argument for Granting the Writ	10
A. The Undisputed Facts Are Insufficient, as a Matter of Law, to Place BFF Within the "Perfectly Clear" Rule of *Burns*	10
B. Assuming, *Arguendo*, That It Was Perfectly Clear BFF Intended to Retain All of SJP's P&M Employees, If for Lawful, Nondiscriminatory Reasons a Majority of BFF's Production and Maintenance Workforce Did Not Come From the Ranks of SJP's Employees the *Burns* Perfectly Clear Rule Does Not Make BFF a Successor to SJP	12
Conclusion	20

TABLES OF AUTHORITY

Table of Cases

D.R.C. Incorporated, 233 NLRB 1409 (1977)	15
Garment Workers v. NLRB, 366 U.S. 731 (1961)	19, 20
Houston Distribution Services, Inc., 227 NLRB 960 (1977)	15
International Ass'n of Machinists & Aerospace Workers, AFL-CIO v. NLRB, 595 F.2d 664 (D.C. Cir. 1978)	13
Majestic Weaving Co., Inc., 147 NLRB 859 (1964)	19, 20

Page

NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1973) ..... 10, 12, 13, 15, 17, *et seq.*

NLRB v. Iron Workers, 434 U.S. 335 (1978) 20

NLRB v. John Stepp's Friendly Ford, 388 F.2d 883 (9th Cir. 1964) 18

Pacific Hide & Fur Depot, Inc. v. NLRB, 553 F.2d 609 (9th Cir. 1977) 18

Pinewood Care Center, Inc., 242 NLRB 86 (1979) 16

Spruce Up Corporation, 209 NLRB 194 (1974) ..13, 14, 15

The Boeing Company, 214 NLRB 541 (1974) 13, 14, 15-16

Statutes

28 U.S.C. § 1254(1) 2

29 U.S.C. § 157 20

29 U.S.C. § 158(a)(1) 20

29 U.S.C. § 158(a)(2) 20

29 U.S.C. § 158(a)(5) 2

29 U.S.C. § 158(b)(1)(A) 20

29 U.S.C. § 158(f) 20

29 U.S.C. § 159(a) 2-3, 15, 18, 20

29 U.S.C. § 160(f) 9

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Bellingham Frozen Foods, Inc., a Washington State corporation, by its attorneys, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed August 14, 1980.

OPINIONS BELOW

The National Labor Relations Board (herein Board) issued its Decision and Order herein on September 1, 1978, reported at 237 NLRB 1450. Bellingham Frozen Foods, Inc. (herein BFF) petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's Decision and Order. The Court entered an opinion, reported at

.... F.2d ...., 105 LRRM 2404 (1980), enforcing, in part, and denying, in part, the Board's Decision and Order. The Court's opinion and order denying rehearing are reprinted in the Appendix (separately bound) commencing on page A-1 and the Board's Decision and Order is reprinted in the Appendix commencing at page A-33.

JURISDICTION

The opinion of the Court of Appeals was entered August 7, 1980, and its order denying a rehearing was entered September 26, 1980. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is the Labor Management Relations Act, 1947, as amended, more particularly Title I thereof, Amendments of the National Labor Relations Act, Sections 8(a)(5) and 9(a), 29 U.S.C. §§ 158(a)(5) and 159(a), respectively, which read:

> Sec. 8. (a) It shall be an unfair labor practice for an employer —
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * *
>
> Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such

grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF THE CASE

For some years prior to 1977, Bellingham Frozen Foods, a division of San Juan Packers, Inc. (herein SJP) operated a frozen food processing plant at Bellingham, Washington on land sub-leased from Bellingham Cold Storage, Inc., who was the lessee of the municipality of the Port of Bellingham. SJP owned the processing machinery, harvesting machinery and the plant equipment; its product was stored by Bellingham Cold Storage until shipped.

The processing season for the plant began each year in early July with the arrival of the pea crop, followed by beans, corn and carrots. The processing work, historically, including SJP and BFF, was performed by seasonal employees, the first of which were hired in July. Some seasonal employees were employed until the end of processing season, usually December, sometimes January.

The plant employed nonseasonal workers of two types, (1) maintenance employees and (2) repack employees. All vegetables purchased by SJP and BFF were and are processed into frozen product. (Court's opinion of August 7, 1980, p. 2 line 10, Appendix p. A-3, erroneously states that BFF and its processors sold fresh as well as frozen produce.) All product is initially stored in bulk. Repack is putting bulk frozen product into small containers as specified by the customers to whom the product is sold and shipped.

Early in 1977 SJP filed a petition in bankruptcy. In February 1977 Frank Brooks, later an incorporator of BFF, submitted a bid to the bankruptcy court to buy the plant and harvest equipment of SJP, but not its inventory of frozen product. Brooks acted on behalf of himself and four other potential investors.

While the bid was pending, Gordon Hayes, one of the five potential investors, requested a meeting with Marven Eggert, chief executive officer of General Teamsters, Warehouse, Food Processing, Cannery Workers & Public Employees Local Union No. 231 (herein the Union), which represented SJP's production and maintenance (herein also referred to as P&M) employees. The meeting was held March 16, 1977. Hayes told Eggert of the investors' attempt to acquire SJP assets and operate the plant for a processing season in 1977. Eggert testified, without contradiction by other evidence, as follows concerning what Hayes said about staffing the plant if it were to be operated by Hayes' group: (Transcript of proceedings 284:12-285:10 and 287:2-19.)

Q. As best you can try to relate what Mr. Hayes said to you and what you said to him.

A. Okay. Gordon said there had been some problems in the plant—obviously, the company went bankrupt. 'We do have some problems in the plant. We're not particularly sure what they are other than there has been some abuse, we think. I've seen some beer bottles around the area and I suggest or I recognize that as a problem.' We had discussed previously with management and also I advised Gordon that management was, in my opinion, spending too much time at the yacht club and harbor house and that they are to direct the crew. He knew that was a problem. He said there would be changes and also he told me there were some people he did not want

to call—probably would not call back because—I'm not sure if he used the term 'bummers' or 'bad apples' but in any event, there were some that were on the seniority list that they probably would not want to recall because of their—I was going to use the words work habits but I think that's my wording, I don't think that is his. Whoever he had discussed this with, there were some people they didn't want to have return.

He also advised me that in line of the office clerical, that they would want to bring in their own employees in the office.

* * *

A. I recall explaining to Gordon about the farm contract and in that line we got into a discussion on the Teamsters and the farm workers situation. I explained to Gordon that we did not represent the farm workers; that is, those people who drive the tractors and work the combines and so forth. We only represented the mechanics under the farm shop contract.

Q. When Mr. Hayes made reference to the fact that there were some people, whether he used the term bummers or whatever; that he was concerned about calling back, do you recall saying anything on that subject?

A. Yes. I believe it was at that meeting that I said we had had a contract or a seniority list in existence for a number of years and I was sure that the bummers had been weeded out, and we couldn't imagine having any—I didn't say that—that the bummers had been weeded out and that we wouldn't see a problem. If he had a specific problem—someone he had specific problems with, we would be able to discuss that and I am sure reach an understanding on it.

Shortly after the conclusion of the March 16 meeting Hayes telephoned Eggert and asked Eggert to send a copy of SJP's agreement with the Union; Eggert immediately sent an assistant to Hayes' office with a copy of the SJP contract.

On Friday, April 1, 1977 the investors learned of the Bankruptcy Judge's approval of the sale. Hayes immediately contacted Gary Tripp, SJP's then manager, and the plant manager selected by the investors. He told Tripp to invite all maintenance employees of SJP (including those on lay off status) to report for work on Monday, April 4, 1977 if they wished to work for BFF.

All SJP maintenance employees were hired by BFF on April 4, 1977 and commenced work. BFF did not hire repack employees, as such, until its new repack facilities were ready in August 1977. BFF had no product to repack until it processed peas in July. SJP stayed in business by continuing repack with its own employees through July 1977. As they became available, BFF hired all SJP's repack employees who applied with BFF, putting them to work in plant preparation or production work until BFF had repack work.

On April 14, 1977 Eggert called on Hayes at the BFF plant to discuss representation of the employees, and asked BFF to assume labor contract delinquencies of SJP. Hayes denied any obligation to assume SJP's delinquencies. Eggert testified concerning Hayes' reply to Eggert's request for a contract at Tr. 291:21-25:

> Gordon said we don't have any problem in the area of health and welfare but we sure do in the area of pension; specifically, the pension contribution to seasonals. He said that seven and a half cent contribution for seasonals is ridiculous.

Concerning recognition and bargaining, Eggert further testified at Tr. 293:24-294:3:

Q. Do you recall anything else being said at that time?

A. Yes. We talked in general terms about the industry contracts. Gordon said they had their own operation

> and were not interested in becoming involved in an industry contract situation.

The meeting concluded by Eggert stating he would send a contract proposal, modified from the standard area agreement for the industry, so as to meet BFF's expressed preference for a contract of its own.

By letter dated April 19, 1977, R.Ex.1, Eggert sent a proposed contract to BFF. BFF answered by letter dated April 22, R.Ex.2, which reads:

> In response to your letter of April 19th, I wish to point out that Bellingham Frozen Foods is a brand new organization. We neither assumed the existing San Juan labor agreement nor would we be considered as a successor to the San Juan operations.
>
> As noted in your letter, we have at this time hired only maintenance employees who constitute a very small fraction of the work force comprising the former bargaining unit. Therefore, it may not be possible to determine until we have hired our full complement of employees whether Teamsters Local Union 231 is in fact the bargaining representative representing a majority of the employees in the unit.
>
> As I previously told you, we are feeling our way along in a number of situations. Obviously, we want to be cautious about making any long-term commitments in a hasty fashion. Under the circumstances, we do not feel that the negotiation of a labor agreement with your union is either mandated or desirable for our company at this time.

Later, formal negotiations for a contract took place. Several meetings, including one with a federal mediator, all foundered on BFF's refusal to grant recognition to the Union as the exclusive representative of a bargaining unit composed of both seasonal and nonseasonal employees. All the negotiating meetings took place before BFF hired any seasonal employees. BFF refused to grant recognition for

seasonals on the ground it had not yet hired seasonal employees. Contrary to the Board's findings, affirmed by the Court of Appeals, BFF never expressed opposition to agreeing to a bargaining unit which included seasonals, BFF only said it would not grant recognition in a unit including seasonals until the Union's majority status in such unit could be ascertained. The Union refused BFF's proffered recognition as representative of a unit limited to nonseasonals, a group where the Union concededly had majority status. On June 27, 1977 BFF filed two petitions with the Board designated Cases Nos. 19-RM-1421 and 19-RM-1422 seeking certification elections in either a unit limited to seasonal employees (RM-1422) or a combined unit of seasonal and non-seasonal (RM-1421). Thus, BFF's willingness to bargain in a combined unit of seasonals and nonseasonals was conclusively established by its filing of the petition in RM-1421. All BFF sought was evidence of majority status. By letter dated September 27, 1977 the Board's Regional Director dismissed both of BFF's petitions because of the issuance of the complaint against BFF in NLRB Case No. 19-CA-9603 alleging that BFF was a successor to SJP.

Terms and conditions of employment for BFF's seasonal employees, different from those for SJP's seasonals, were determined by BFF in June 1977 without notice to or bargaining with the Union, and before any applicant for a seasonal job was offered employment by BFF.

Historically, including SJP and BFF, seasonal hiring starts in July when about 30 are hired for pea processing. Seventy more seasonals are added in late July or early

August as bean processing is added along with peas. Pea processing ends in September, is supplanted by corn, which adds 60 more seasonal employees; carrots supplant beans about mid-September adding about 70 more seasonals. The full complement of well over 200 seasonals is reached durthe corn/carrot pack.

BFF's bi-weekly payroll period records, adduced at the Board hearing, adjusted even to include first and second line supervisors as employees in the unit (which adjustment adds to the number of former SJP employees hired by BFF) show the following workforce complement and percentage of former SJP employees employed in the combined unit of nonseasonal and seasonal production and maintenance employees (dates show ending date of pay period): Aug. 6 — 165 (43%); Aug. 20 — 196 (38.7%); Sept. 3 — 195 (38.9%); Sept. 17 — 196 (37.7%); Oct. 1 — 265 (27.5%); Oct. 15 — 253 (29.2%); Oct. 29 — 247 (30.3%); Nov. 12 — 204 (37.2%). The hearing on the Board's complaint began November 15, 1977, after the full complement of seasonals had been hired, but before the 1977 packing season ended.

Thus, when BFF had hired its full complement of its production and maintenance employees, nonseasonals and seasonals, the majority of its production and maintenance unit employees *had not* come from the ranks of SJP's production and maintenance unit.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked by Petitioner pursuant to Section 10(f), National Labor Relations Act, 29 U.S.C. § 160(f).

ARGUMENT FOR GRANTING THE WRIT

A. The Undisputed Facts Are Insufficient, as a Matter of Law, to Place BFF Within the "Perfectly Clear" Rule of *Burns*

In *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1973) this Court laid down guidelines to be used in determining a successor employer. The words from *Burns*, relied upon by the Court of Appeals, are the following from 406 U.S., pp. 294-295:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then *that the bargaining representative represents a majority of the employees in the unit as required by §9(a) of the Act, 29 USC § 159(a).*

(Emphasis added.)

The material facts in this case are not disputed. It is the legal consequences which flow from those undisputed facts which Petitioner contests. Petitioner submits that Hayes did not, in his preliminary inquiry conference with Eggert on March 16, 1977, indicate a perfectly clear intent by BFF to retain all of SJP's production and maintenance employees. Rather, as testified to by Eggert, Hayes stated: First, that BFF would not be hiring any of SJP's office workforce. Second, he was unwilling to say that all SJP production and maintenance employees would be hired.

Hayes reserved the right to decide, at a later time, which of SJP's production and maintenance employees would be hired by BFF, telling Eggert that some SJP employees might be "bummers" or "bad apples".

The preliminary and indefinite nature of BFF's hiring intentions, as stated by Hayes to Eggert on March 16, 1977, were certainly natural. At that point the investors who would incorporate BFF had not received approval of the sale by the bankruptcy court, had not hired a plant superintendent or a single management staff person, had not had an opportunity to take applications from SJP employees, or to review their performance. Nor can it be said that Hayes led Eggert to believe that BFF would offer the same terms and conditions as SJP had, since the main reason Hayes called on Eggert was to find out what SJP's union contract terms were. A copy of SJP's union agreement was requested by Hayes and delivered to Hayes immediately after his March 16 meeting with Eggert.

While it is true that BFF hired all of SJP's maintenance employees on April 4, 1977 (about 20 of the P&M unit which eventually reached 265), no decision or thought was given to recruiting seasonals until June. In June 1977 Hayes approved initial terms and conditions for BFF's seasonals, different from those in SJP's union agreement, and also a list of former SJP seasonals who would be considered eligible for hire by BFF. Not all SJP seniority holders applied to BFF.

Hayes' preliminary and noncommital statements to Eggert on March 16, 1977, were not a "perfectly clear" statement of BFF's hiring intentions; to conclude they were is simply stretching the undisputed facts well beyond the legal breaking point.

B. Assuming, *Arguendo*, That It Was Perfectly Clear BFF Intended to Retain All of SJP's P&M Employees, If for Lawful, Nondiscriminatory Reasons a Majority of BFF's Production and Maintenance Workforce Did Not Come From the Ranks of SJP's Employees the *Burns* Perfectly Clear Rule Does Not Make BFF a Successor to SJP

In its opinion, p. 7 lines 27-30 (Appendix p. A-16) the Court of Appeals states:

> When it is 'perfectly clear' that the employer intends to hire a majority of his workforce in a unit represented by a union from the ranks of his predecessor, his duty to bargain with the Union commences immediately.

This is generally true, because in most instances a purchaser's initial perfectly clear intent to retain all of the predecessor's workforce becomes an actuality. However, experience since *Burns* was decided has demonstrated that it does not follow, axiomatically, that the employees involved will consent to, or be available for, the intended retention. Where, by perfectly lawful conduct in recruiting and hiring, the possible successor's perfectly clear intent is not sufficiently effectuated, the new employer, a potential successor, may not become an actual successor because the element of majority, the statutory *sine qua non* of an obligation to recognize and bargain, must still be met. No majority hiring from the predecessor's employees means no successorship, regardless of perfectly clear intent.

The statutory majority requirement was specifically adverted to, more than once, by this Court in its *Burns* decision. There is the language at 406 U.S. 294-5, set forth *supra*. Earlier in its *Burns* decision this Court referred to the majority *sine qua non* stating at 406 U.S. 277:

> We address first Burns' alleged duty to bargain with the union, and in doing so it is well to return to the specific provisions of the Act, *which courts and the Board alike* are bound to observe. Section 8(a)(5), as amended by the Labor Management Relations Act, 1974, 29 USC § 158(a)(5), makes it an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 159(a) of this title.' Section 159(a) provides that '[r]epresentatives [are] designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .' *Because the Act itself imposes a duty to bargain with the representative of a majority of the employees in an appropriate unit, the initial issue before the Board was whether the charging union was such a bargaining representative.*

(Emphasis added.)

It is submitted that the "perfectly clear" sentence in *Burns* was not intended to change the basic statutory requirement of majority status. Nor could such a statutory change be made by an administrative agency or court, even this Court.

The Board, itself, and another United States Court of Appeals have held that the hiring of a majority from the workforce of the predecessor must follow the *Burns* perfectly clear intent, or there is no successor. *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. NLRB*, 595 F.2d 664 (D.C. Cir. 1978), affirming the Board's decision in *The Boeing Company*, 214 NLRB 541 (1974); *Spruce Up Corporation*, 209 NLRB 194 (1974). It is submitted that a square conflict exists between this District of Columbia Circuit decision and that of the Ninth Circuit in the case at bar.

The Ninth Circuit attempts to distinguish *Spruce Up* and *Boeing* on the ground that employment by BFF was not conditioned on proposed different conditions. (In fact, as to seasonals, it was—Hayes testified, without contradicting evidence of any kind, that BFF established different wages and conditions for seasonals from SJP's, doing so in June 1977, a month before any seasonal employee was hired by BFF, and, as early as April 14 Hayes had told Eggert that pension coverage for seasonal employees was ridiculous.) But the major reason that *Spruce Up* and *Boeing* are not properly distinguished is that the Court of Appeals for the Ninth Circuit has merely focused on the apparent reason why the employees of the predecessors in *Boeing* and *Spruce Up* chose not to come to work for the potential successors. It is submitted that their reasons for not accepting employment are not material. It is not the reasons which motivate the employees of the predecessor not to accept employment with the new employer, but rather the result that majority of the employees of the new employer did not come from the ranks of the predecessor that prevents successorship.

Every case cited by the Court of Appeals in its opinion herein in support of its conclusion that BFF is a successor to SJP involves a fact situation where the new employer's workforce contained a majority drawn from the ranks of the predecessor. Except for the case at bar, there is no case subsequent to *Burns* where either the Board or a Court of Appeals has found successorship absent majority hiring.

Of course, if the new employer illegally discriminates against applicants from the old employer, then the remedy of instatement for those applicants may produce the required majority, but BFF was not charged with such dis-

crimination. *E.g., D.R.C. Incorporated,* 233 NLRB 1409 (1977); *Houston Distribution Services, Inc.,* 227 NLRB 960 (1977). It is not surprising that BFF was not alleged by the Board to have discriminated in hiring, for of 208 employees who held seniority at SJP, only 108 applied to BFF. Of those 108, 100 were offered jobs by BFF, *i.e.,* 93.5% of those applying were offered a job.

In addition to the conflict between the Circuit Courts, there has been an ongoing conflict among the Members of the Board as to the proper meaning of the *Burns* "perfectly clear" exception. Beginning in *Spruce Up Corporation, supra* (dissenting opinions), Board Members Fanning and Penello have consistently taken the view that the majority requirement of § 9(a) does not apply to the employees of a new employer which decides to retain the employees of the old employer, even though some of the employees choose not to accept the intended retention by the new employer, and the majority of the new employer's employees had not worked for the old employer. An example of this continuing view is the dissenting opinion of Board Members Fanning and Penello in the Board's decision in *The Boeing Company, supra,* where they say at 214 NLRB 542:

> However, despite all the foregoing positive factors pointing to the "substantial continuity of identity in the business operation before and after a change" in employer, (footnote omitted) the Administrative Law Judge failed to find that Boeing was a successor to TWA because a majority of its ISS unit employees at the takeover on April 1, 1971, did not consist of TWA incumbents, and he found this failure of a majority could not be attributed to unlawful unilateral reduction of wages by Boeing. While as set forth hereafter, we disagree with the latter finding, without regard to how one determines the pretakeover bargaining

issue, we do not for the reasons articulated in the separate dissents in *Spruce Up, supra* find the lack of majority to be fatally deficient in establishing the successorship of Boeing.

In *Spruce Up* we agreed:

> Successorship does not depend on the employment of a majority of the predecessor's employees, but on whether a legally significant portion of the successor's employment force consists of employees previously employed in the bargaining unit. In making that determination, the question of whether employees of the predecessor actually predominate over other employees can hardly be the acid test of successorship, although it may be an important factor in determining whether the successor employer has a basis for doubting the Union's majority status. (Footnote omitted.)

The fallacy of insistance upon majority population is fundamental. Whether or not an employer has the status of a successor cannot turn in any part of its own decision to populate its work force with more than half or less than half of the predecessor's employees.

Also see footnote 3 from the Board's decision in *Pinewood Care Center, Inc.*, 242 NLRB 86 (1979), which reads:

> 3. As explained in his partial dissent in *Spruce Up Corporation*, 209 NLRB 194, 203 (1974), a case relied upon by the Administrative Law Judge in the instant case, Chairman Fanning believes that under *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), the bargaining obligation of a successor employer commences at the point when an employer manifests an intent to retain the employees of its predecessor, rather than at the point when a successor actually employs a majority of its predecessor's employees. See also *Charles Starbuck and Diane Starbuck d/b/a Starco Farmers Market*, 237 NLRB No. 52 at fn. 4 (1978).

Until the case at bar, Board Members Fanning and Penello were never able to muster a majority of the Board to

support their view that majority status of the new employer's employees is immaterial when perfectly clear intended retention is shown.

A short hypothetical may more clearly expose the legal error of the Fanning/Penello/Ninth Circuit viewpoint. Assume Seller (S) and Purchaser (P) agree, in writing, to buy/sell the assets of S's business so that P can carry on S's business. S has a union contract covering a bargaining unit consisting of three employees, A, B, and C, whom P agrees, in the written purchase/sale agreement, to retain. S is to terminate operations June 30; P is to commence July 1. P goes to A shortly before July 1 and tells A of the sale, his promise to retain him, and asks A to report for work July 1. P says nothing to A, nor in his later contact with B and C, about any decision to have terms or conditions of employment different from S. A decides he prefers to retire and declines P's offer of employment. For other reasons, both B and C decline P's offers of employment. P hires D, E and F, who did not work for S, and none of whom had designated the union as their bargaining representative. P starts in business on July 1 with employees D, E and F. By the Ninth Circuit's view, P is S's successor and must recognize and bargain with the union. If P hired only C, and new employees D and E, the Fanning/Penello view would make P a successor since their substantial number requirement (in this hypothesis 33%) would be met, even though the statutory majority requirement would not be.

Petitioner submits that the Fanning/Penello/Ninth Circuit position is contrary to the provisions of the N.L.R.A. and to the proper interpretation of the *Burns* "perfectly clear" exception. The "perfectly clear" exception, if given

the Fanning/Penello/Ninth Circuit interpretation, does not apply §§ 8(a)(5) and 9(a) of N.L.R.A., it amends those provisions, by removing the basic element of the intended industrial democracy established by the U.S. Congress, *i.e.*, the principle of majority rule. Under the Fanning/Penello/Ninth Circuit interpretation of the *Burns* "perfectly clear" dictum, the choice of representation is made, not by the majority of the employees of the new employer, but by the choice of the employees of the old employer, many, or all of whom, may, for an infinite variety of lawful reasons, never become employees of the new employer. Surely this result was not the intention of this Court.

Inexplicably, the Ninth Circuit had previously made the correct analysis of the successorship majority rule principle in its decision in *Pacific Hide & Fur Depot, Inc. v. NLRB,* 553 F.2d 609 (9th Cir. 1977) where it noted at page 613:

> The problem then becomes one of defining what is meant by a "full complement." That cannot be done by the application of a mathematical formula but only by considering the facts of each case in light of the general goal which is sought—*to assure majority rule within the new employer's unit* as to whether and if so with what union there must be collective bargaining.

(Emphasis added.)

Equally inexplicable is the fact that the Ninth Circuit had, prior to *Burns,* dealt with an attempt by the Board to fix successorship obligations on a new employer who had drawn less than a majority of its unit employees from the ranks of the old employer. The court found the Board without legal authority, under § 9(a) N.L.R.A., to make the new employer a successor. *NLRB v. John Stepp's Friendly Ford,* 338 F.2d 883 (9th Cir. 1964).

It is submitted that the correct application of the disputed *Burns* "perfectly clear" exception, is to make it read:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of the predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit, *[and in which it is also perfectly clear that the employees intended for retention have manifested acceptance of retention by the new employer]*. . . .

It is submitted that this suggested added expression to the "perfectly clear" dictum of *Burns* is no more than what has been clearly there, by implication, all along. The Fanning/Penello/Ninth Circuit view demands that this clear implication be converted to direct statement.

At p. 10, line 20 of the Opinion the Court of Appeals (Appendix page A-23) it finds that BFF voluntarily recognized the Union. Certainly BFF's letter of April 22, set forth *supra,* denies recognition. Only the Hayes/Eggert March 16 and April 14 meetings preceded this April 22 letter by BFF, and it is not clear that Hayes extended recognition as to seasonals in those meetings. It makes no difference. Well before the first seasonal employee was hired by BFF in July 1977, BFF had told the Union that it would not recognize it for seasonals until they were hired and the Union's majority status in a combined unit of nonseasonal and seasonal production and maintenance employees could be ascertained. Therefore, any recognition by BFF would have been pre-hire as to seasonals. Prehire recognition by BFF, if it had taken place, would have been an unfair labor practice. *Garment Workers v. NLRB,* 366 U.S. 731 (1961); *Majestic Weaving Co., Inc.,* 147 NLRB 859 (1964). Indeed, even in the only lawful pre-

hire recognition situation, that permitted by § 8(f), N.L.R.A., 29 USC § 158(f), for construction industry employers, such recognition does not render the union so recognized a majority union and thus a § 9(a) exclusive bargaining representative. Even though lawful, the pre-hire recognition permitted construction employers creates only a voluntary, not mandatory, duty to bargain, which recognition may be freely dissolved by subsequent action of the employer, absent the union's proof of attainment of majority support. *NLRB v. Iron Workers*, 434 U.S. 335 (1978). It is legal error to hold that a pre-hire grant of recognition by BFF was lawful or created § 9(a) status.

Again using the hypothetical, if P were to give exclusive recognition to the Union as the representative of D, E and F, it would be a violation of their rights to be unrepresented, § 7 of NLRA, 29 USC § 157. Such interference by P with his employees' rights would constitute an unfair labor practice under § 8(a)(1) NLRA, 29 USC § 158(a)(1) and also a grant of illegal assistance to the Union in violation of § 8(a)(2), NLRA, 29 USC §158(a)(2). If the union assumed to act as the exclusive representative of P's employees when a majority of P's employees had not chosen it, such union conduct would be an unfair labor practice and a violation of § 8(b)(1)(A), 29 USC § 158(b)(1)(A). *Garment Workers v. NLRB; Majestic Weaving Co., Inc., supra.*

CONCLUSION

For the reasons stated, the Petition should be granted.

EUGENE R. NIELSON
Counsel for Petitioner

80-735

Supreme Court, U. S.
FILED
NOV 6 1980
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1980

No. .....

BELLINGHAM FROZEN FOODS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BELLINGHAM FROZEN FOODS, INC.,	)	
Petitioner,	)	No. 78-3017
v.	)	OPINION
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

Petition to Review a Decision of the National Labor Relations Board

Submitted: February 13, 1980; Decided:

Before: DUNIWAY and ANDERSON, Circuit Judges, and BONSAL,* District Judge

DUNIWAY, Circuit Judge:

Bellingham Frozen Foods, Inc. (Bellingham) petitions for review of a

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*The Honorable Dudley B. Bonsal, Senior United States District Judge for the Southern District of New York, sitting by designation.

Decision of the National Labor Relations Board. The Board cross-appeals for enforcement of the Order. The Decision and Order, dated September 1, 1978, are reported at 237 N.L.R.B. No. 113.

We will enforce the order in part, and we set aside the order in part.

I. Facts.

Since 1965, Bellingham Cold Storage, a different corporation from Bellingham, has leased a vegetable processing and packing plant to a series of food processing firms. In 1974 San Juan Packers (San Juan) became the third lessee of the plant. San Juan encountered financial difficulties and filed a petition in bankruptcy in 1977. Bellingham purchased San Juan's assets and leasehold at a bankruptcy sale. On April 4, 1977, Bellingham began operating the plant except for the "repack" business which

San Juan was permitted to operate until it fulfilled certain outstanding obligations. In July 1977, Bellingham also took over operation of the repack business.

Each of the lessees, including Bellingham, has operated the plant in substantially the same fashion: Vegetables are obtained from farmers and the plant processes and packs the vegetables for sale to its customers. Because the entire harvest cannot be sold fresh, some of the processed vegetables are stored frozen in bulk and "repacked" during the winter and spring in smaller packages covered with retailers' wrappers.

The basic nonseasonal workforce consists of 10 repack employe[e]s, 10 plant maintenance employees and 10 field shop employees. Because each vegetable has a different processing season,

varying numbers of seasonal processing employees are employed during the processing season which runs from early July to December or January. Thus, when peas are processed, from early July to late August, 20 to 30 seasonal employees are hired. Bean processing generally begins in August, continues until early or middle September, and requires 60 to 70 additional employees. Corn is processed from early to mid September until mid October by 60 employees on two shifts. Carrots are processed in the fall and into late November or early December, and require two shifts of 35 employees each. After each crop is completely processed the employees are usually retained to help with the processing of the next crop harvested. The plant has traditionally maintained a seniority list of seasonal employees and

has recalled these employees in order of seniority when it needs additional processing employees.

In 1966, [L]ynden Berry Growers, then the lessee of the plant, voluntarily recognized the Union as the exclusive bargaining agent of the production and maintenance employees at the plant. Succeeding lessees of the plant also recognized the Union as the representative of the bargaining unit, which is described in the last collective bargaining agreement with San Juan as:

> . . . all employees performing work in the Company's processing plants and warehouses located in Bellingham, Washington or in sheds or lots adjacent thereto where commodities or materials are processed or stored, except office employees, superintendents; foremen having the power to hire and discharge; regular weigh-masters and fieldmen. . . .

Historically, this unit included both seasonal and nonseasonal workers. Seasonal employees were covered by the contracts while they performed seasonal processing work; they were also given the opportunity, as positions opened and in order of seniority, to bid on non-seasonal employment.

On September 4, 1975, the Union was elected the exclusive bargaining representative of a unit of San Juan's office clerical employees. In November, 1975, a complaint was filed with the Board against San Juan alleging interference with employees' right to organize and discriminatory discharge in violation of §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act, (29 U.S.C. §§8(a)(1) & (3)) during the course of the clerical workers' union organizing campaign and its immediate aftermath.

After Bellingham took over the plant in 1977, a meeting was scheduled with Marvin Eggert, the Union's representative, on April 14. At this meeting, Hayes, President of Bellingham, expressed strong feelings that seasonal workers should not be included in the bargaining unit. Following the meeting, Eggert sent Hayes a contract. On April 22, Hayes responded denying any obligation to bargain with the Union. On April 29 Bellingham employees voted to strike if Bellingham maintained its position. Negotiations continued between Hayes and Eggert through the beginning of May. On May 13 Hayes presented Eggert with a proposeed (sic) contract excluding seasonal employees from the bargaining unit. The next day the employees voted to reject the contract offer. Eggert

called a strike on May 16 and the employees struck on that date.

Throughout the strike contract negotiations continued with little change in the parties' positions. In June, Bellingham began to hire seasonal employees, ignoring the Union seniority list and inviting all previous employees to apply for jobs. In the end of May and throughout June, Bellingham began replacing some of the strikers, although the new employees were not specifically designated as replacements for particular strikers. On June 24 Eggert told Hayes that the strikers unequivocally offered to return to work and that the seasonal employees on the seniority list were also ready to work. Hayes responded saying that all but six strikers had been permanently replaced and that

Bellingham refused to recognize preferential rights of seasonal workers based on San Juan's seniority list.

In July, 1977, a complaint was filed with the Board against Bellingham alleging unlawful refusal to bargain with the Union, discrimination against strikers, and interference with the organizing rights of employees. In addition, the complaint alleged that as a successor to San Juan, Bellingham was jointly and severally liable for any unremedied unfair labor practices committed by San Juan.

After a hearing, the Administrative Law Judge found that San Juan had violated sections 8(a)(1) and (3) of the Act by terminating Lillian Huber, a clerical employee, because of her union activities, and section 8(a)(1) of the Act by committing other acts which

interfered with its clerical employees' statutory right to select the Union as their bargaining representative. The A.L. Judge also found that Bellingham was the successor to San Juan in the production and maintenance unit and thus was bound to recognize the Union as the representative of the employees in that unit, both seasonal and nonseasonal, and that Bellingham first agreed voluntarily to recognize and bargain with the Union as the representative of those employees, but later breached its bargaining obligations under the Act in three ways. These were (1) by refusing to continue recognizing the Union as representative of all the seasonal employees in the production and maintenance unit, (2) by insisting on excluding seasonal employees from the contract covering that unit, and (3) by making unilateral changes in

unit working conditions. In addition, the A.L. Judge found that Bellingham violated sections 8(a)(1) and (3) of the Act by refusing the unconditional requests of ten unfair labor practice strikers, including Marvin W. Eggert, who was found to be an "employee" under the Act, to return to their jobs, and by telling employees that it would not agree to a contract unless the employees accepted an agreement which excluded seasonal employees from the unit.

The A.L. Judge proposed, and the Board issued, two orders - one against San Juan and one against Bellingham. Each requires the particular employer to cease and desist from violating the Act in the manner found and from interfering with the statutory rights of its employees in any manner. The principal affirmative requirement of the order

against San Juan is that San Juan, jointly and severally with Bellingham, make Lilliam Huber whole for any loss of pay she may have suffered because of her discriminatory discharge. On May 8, 1979, we granted the Board's motion for default judgment to enforce this order against San Juan. The Board's finding that the discharge of Huber was a violation of § 8(a)(3) is supported by substantial evidence. Thus the only issue here is the enforceability of this order against Bellingham.

The order against Bellingham affirmatively requires it to bargain collectively with the Union as the exclusive bargaining representative of all the employees in the production and maintenance unit as historically composed, to reinstate any terms of employment

existing on April 4, 1977, when Bellingham became the employer, and to make employees whole for any losses they may have incurred as a result of Bellingham's unilateral changes in their terms and conditions of employment, including changes in the seniority lists and recall procedures. The order further requires Bellingham to reinstate ten named strikers and make them whole for any losses they suffered by virtue of Bellingham's previous refusal of their requests for unconditional reinstatement. Finally, in addition to the usual notice-posting requirement, the order requires Bellingham, as San Juan's successor with knowledge of San Juan's unfair labor practices, to offer discriminatee Huber reinstatement and, jointly and severally with San Juan, to make her whole for losses suffered as a result of her

discharge. The Board adopted the Decision of the A.L. Judge without change.

II. Bellingham's Duty to Bargain.

"It is a settled principle that when employees have bargained collectively with an employer and there occurs a change of ownership not affecting the substantial nature of the enterprise, the successor employer must recognize the incumbent union and deal with it as the bargaining representative." Tom-A-Hawk Transit, Inc. v. NLRB, 7 Cir., 1969, 419 F.2d 1024, 1026-1027. Accord: NLRB v. Burns International Security Services, Inc., 1973, 406 U.S. 272, 279; NLRB v. Dent, 9 Cir., 1976, 534 F.2d 844, 846. If a majority of the employees in the unit after the purchase were in the unit before the purchase, there is a duty to bargain, it being assumed that the holdover majority continues to

desire representation by the Union. Pacific Hide & Fur Depot, Inc. v. NLRB, 9 Cir., 1977, 553 F.2d 609, 611.

Nevertheless, a purchaser of assets is under no obligation to hire employees of a predecessor and is free to set the initial terms of employment for these employees should it decide to hire them. Employees are also free to accept or reject the terms offered. Therefore,

> [I]t may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 U.S.C. § 159(a). Burns, supra, 406 U.S. at 295.

However, the Court also said (406 U.S. at 294-295):

> Although a successor employer is ordinarily free to set initial terms on which it will hire employees of a predecessor,

> there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

When it is "perfectly clear" that the employer intends to hire a majority of his workforce in a unit represented by a union from the ranks of his predecessor, his duty to bargain with the Union commences immediately.[1/]

The A.L. Judge found that "the employees of . . . San Juan, including the seasonal employees, would be the

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1/ However, the obligation of a successor employer is merely to recognize the union and to bargain; it is not bound by the substantive provisions of a collective bargaining contract negotiated by its predecessor but not agreed to or assumed by it. Burns, supra, 406 U.S. at 284.

primary source for . . . Bellingham's staffing needs, so long as such employees were available." and that "subsequent events only fortify the conclusion that . . . Bellingham's pre-takeover intent had been to staff the facility with the former employees of . . . San Juan, save for the office clericals." The A.L. Judge and the Board found this case illustrative of the "perfectly clear" scenario envisioned by the Court in Burns, supra.

We are required by the Act, § 10(e), 22 U.S.C. § 160(e), to sustain the findings of the Board if they are supported by substantial evidence on the record taken as a whole. Universal Camera Corp. v. NLRB, 1951, 340 U.S. 474, 491. The Act makes such findings "conclusive." With regard to Bellingham's intent to hire a majority of its

employees from those who previously worked for San Juan in the production and maintenance unit, the findings of the A.L. Judge adopted by the Board are "conclusive."

When Hayes, the President of Bellingham, talked with Eggert, the Secretary-Treasurer of the Union on March 16, about the Union's collective bargaining agreement for the plant, Hayes said that he would employ all but "some" of San Juan's employees in the production and maintenance unit. In contrast, Hayes was adamant in asserting that Bellingham intended to bring in its own office employees. Nor was there any suggestion when Bellingham began operating the plant that the unit would not remain intact. Employees were asked informally to remain in their current positions without having to apply to Bellingham

for employment. On the morning of the takeover, Hayes assembled the employees and as the Board found, "the message he conveyed was confined to an appeal to get the equipment ready for the processing season and an assurance that they would continue to be paid at the same rates and that their pay checks would be honored. Indeed Hayes conceded [in his testimony] that no pre-takeover changes in terms and conditions of employment had been planned or formulated." Bellingham maintained virtually all previous working conditions for a week after the takeover. Therefore, unlike that in Spruce Up Corp., 1974, 209 NLRB 194, enforced, 4 Cir., 1975, 529 F.2d 516 (memorandum), and its progeny, the offer of employment by Bellingham was not conditioned upon an employee's acceptance of changed terms

and conditions of employment. See generally, International Association of Machinists v. NLRB, 1978, D.C. Cir., 595 F.2d 664, 672 n.40. The Board was warranted in concluding that it was "perfectly clear" that Bellingham intended to staff the plant with a sufficient number of San Juan employees to trigger a bargaining obligation as a successor employer. See NLRB v. Dent, supra, 534 F.2d at 846 n.2. See also Int'l Assn. of Machinists v. NLRB, supra; Spitzer Akron, Inc. v. NLRB, 6 Cir., 1976, 540 F.2d 841, 845; NLRB v. Bachrodt Chevrolet Co., 7 Cir., 1972, 468 F.2d 963, 969, vacated on other grounds, 1973, 411 U.S. 912, enforced, 7 Cir., 1975, 512 F.2d 512 (memorandum).

Bellingham's hiring actions following the April 4 takeover strengthen the Board's finding that Bellingham's intent

was to hire the San Juan employees. Not only was the initial production and maintenance unit composed entirely of former San Juan employees, but San Juan employees also continued to constitute a majority of the unit for a substantial period of time after the takeover. Former San Juan workers were not outnumbered in the unit until the payroll period ending August 20, almost five months after Bellingham began to operate the plant. A significant number of the persons on the seniority list applied for seasonal positions. Almost everyone who did apply was hired including one employee listed as an inadequate performer. The A.L. Judge stated:

> While these events occurred after April, they do shed light upon Respondent Bellingham's intent as it existed at the time of the takeover. First they show that in using the term "some," Hayes had

> been adknowledging that only a minority of the employees on the seniority list were so inadequate that Respondent Bellingham would perfer (sic) not to employ them. Second, they confirm what Hayes' comments of March 16 implicitly acknowledged: That, as a practical matter, the employees of Respondent San Juan, including the seasonal employees, would be the primary source for Respondent Bellingham's staffing needs, so long as such employees were available. Finally, no evidence of any busienss need was presented to show that a change in procedure for securing seasonal employees was necessitated. (footnote omitted).

Bellingham only challenged the Union's representative status once it became clear from its contract negotiations that the Union would not agree to change the bargaining unit to exclude seasonal employees. By this time Bellingham's obligation to bargain with the Union had already occurred. That obligation occurred as soon as it was

perfectly clear that Bellingham intended to accept San Juan employees as its own in the production and maintenance unit. In fact, the Board found that Bellingham, in acknowledgment of its obligation to bargain, recognized the Union voluntarily--a finding supported by substantial evidence. Bellingham's subsequent actions may not dissolve that obligation to bargain.

Because Bellingham's obligation to bargain accrued at the time it took over the plant it could not unilaterally change the terms and conditions of employment after it specified the terms and conditions on which San Juan employees would be retained. Burns, supra, 406 U.S. at 294-295. Because Bellingham did not change any terms and conditions of employment until a week after it took over the plant, the the

(sic) Board's order properly required it to make whole nonseasonal and seasonal employees for any losses they suffered because of the changes.

Bellingham does not challenge the unfair labor practice findings on any ground other than its contention about its obligation to bargain with the Union. It is not disputed that it refused to bargain with the union as the representative of the seasonal as well as the nonseasonal workers. An employer cannot unilaterally change the scope of a recognized bargaining unit. Bellingham's attempt to do so made the strike an unfair labor practice strike entitling

ten workers to unconditional reinstatement.[2/] Thus, we will enforce the order of the Board insofar as it requires Bellingham to bargain with the Union for the production and maintenance unit, to make its employees whole for any injuries resulting from its refusal to bargain and to remedy the unfair labor practices

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2/ One of the ten unfair labor practice strikers deserving reinstatement is Marvin W. Eggert, although Bellingham claims that Eggert was a supervisor and not an employee protected under Sections 8(a)(3) and (1). The Board rejected this claim stating that after Norm Coker was hired as general plant foreman, Eggert "no longer possessed any of the indicia of supervisory activity [listed in Section 2(11)], accompanied by ability to exercise independent judgment." The Board's determinations of this sort are entitled to great deference in light of its special expertise. See, Marine Engineers Beneficial Ass'n v. Interlake Steamship Co., 1962, 370 U.S. 173, 179-180. Bellingham presents no convincing reason why we should not defer to the Board in this instance.

it committed in connection with the unfair labor practice strike that followed its refusal to bargain.

III. Obligation to Remedy Unfair Labor Practices of San Juan.

Although the Board found that Bellingham was a successor employer, obligated to bargain with the Union with respect to the production and maintenance unit, this does not necessarily mean that Bellingham was a successor employer for all purposes. Howard Johnson Co. v. Hotel Employees, 1974, 417 U.S. 249, 262-263 n.9. In determining in this context whether Bellingham is required to remedy the unfair labor practices of San Juan, it is necessary to consider what the obligations of Bellingham are to the office clerical employees presently employed.

> The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor law in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. Id.

In Golden State Bottling Co. v. NLRB, 1973, 414 U.S. 168, the Court required a purchaser of a business to reinstate an employee whom the predecessor employer had illegally discharged. That case differs from this one in that there the new employer was a successor employer under the Burns test for purposes of the bargaining unit from which the employee had been discharged, while in this case there was no finding that Bellingham was a successor employer for purposes of a bargaining obligation in the unit

involved, the unit of office clerical workers. The employer's status in relation to a particular unit is determinative of its designation as a successor. See Pacific Hide & Fur Depot v. NLRB, supra, 553 F.2d at 614, citing NLRB v. John Stepp's Friendly Ford, Inc., 9 Cir., 1964, 338 F.2d 833, 836. From its earliest contacts with the Union, Bellingham asserted its intention to provide its own clerical employees, and the record does not dispute that it did so. There was no finding, nor could there have been, that it was "perfectly clear" that Bellingham was a successor employer for purposes of bargaining with the clerical workers. Bellingham's failure to hire San Juan's clerical employees was never attributed to any anti-union animus. See Howard Johnson Co. v. Hotel

Employees, supra, 417 U.S. at 262 n.8, and cases cited therein.

As the Court recognized in Golden State, supra, 414 U.S. at 184 n.6:

> A purchasing company cannot be obligated to carry out . . . every outstanding and unsatisfied order of the Board. For example, because the purchaser is not obligated by the Act to hire any of the predecessor's employees, the purchaser, if it does not hire any or a majority of those employees, will not be bound by . . . any order tied to the continuance of the bargaining agent in the unit involved. (citations omitted) (emphasis added).

We think that the order to reinstate Huber, who was an office clerical worker discharged by San Juan for her union activities, is an order tied to the continuance of the bargaining agent in the office clerical worker unit. As to that unit, Bellingham is not a successor, and the order requiring it to reinstate

Huber cannot stand. When Bellingham took over, it did not employ any of the office clerical workers employed by San Juan. If Huber had been reinstated before Bellingham took over, presumably she, like the other office clericals, would not have been hired by Bellingham.

Judgment

The portion of the Board's order that requires reinstatement of Huber by Bellingham (Paragraph 2(a)) is set aside, and the notice ordered by the Board to be posted, Appendix B to the Board's order of September 1, 1978, shall be modified accordingly. In all other respects, the order of the Board will be enforced.[3/]

3/ We have previously enforced the Board's order against San Juan, in our No. 78-3491, June 20, 1979, modified, Oct. 24, 1979, by deleting all references therein to liability on the part of Bellingham.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BELLINGHAM FROZEN FOODS, INC.,	)	
Petitioner,	)	No. 78-3017
v.	)	O R D E R
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

Before: DUNIWAY and ANDERSON, Circuit Judges, and BONSAL,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion of a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing,

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*The Honorable Dudley B. Bonsal, Senior United States District Judge for the Southern District of New York, sitting by designation.

and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion of a rehearing in banc is rejected.

237 NLRB No. 113

D--4087
Bellingham, Wash.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BELLINGHAM FROZEN FOODS,
A DIVISION OF SAN JUAN
PACKERS

and

Case 19--CA--
8086

GENERAL TEAMSTERS, WARE-
HOUSE, FOOD PROCESSING &
CANNERY WORKERS & PUBLIC
EMPLOYEES LOCAL UNION
NO. 231, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

BELLINGHAM FROZEN FOODS,
INC.

and

Case 19--CA--
9603

GENERAL TEAMSTERS, WARE-
HOUSE, FOOD PROCESSING &
CANNERY WORKERS & PUBLIC
EMPLOYEES LOCAL UNION
NO. 231, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

DECISION AND ORDER

On April 5, 1978, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, Respondent Bellingham Frozen Foods, Inc., filed exceptions and a supporting brief, and counsel for the General Counsel filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided

to affirm the rulings, findings,[1/] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents,

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1/ Respondent Bellingham Frozen Foods, Inc., has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (A.C. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

Bellingham Frozen Foods, a Division of San Juan Packers, and Bellingham Frozen Foods, Inc., Bellingham, Washington, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.[2/]

Dated, Washingotn, D.C. September 1, 1978

John A Penello, Member

Betty Southard Murphy, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

2/ This substitution is necessary to conform the notice with the recommended Order.

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT tell you that there will be no collective-bargaining agreement with the General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, unless our proposal excluding seasonal employees from the historic bargaining unit is accepted.

WE WILL NOT refuse to reinstate unfair labor practice strikers upon receipt of their unconditional application for reinstatement or upon receip[t]

of such an application made on their behalf by the above-named Union.

WE WILL NOT refuse to recognize and bargain collectively with the above-named Union as the collective-bargaining representative of:

> All employees performing work in Bellingham Frozen Foods, Inc.'s processing plants and warehouses located in Bellingham, Washington, or in sheds or lots adjacent thereto where commodities or materials are processed or stored, except: office employees; superintendents; foremen having the power to hire and discharge; regular weighmasters and fieldmen; and other employees who are excluded from the historical bargaining unit,

except as provided in Article IX, Section 9 of the 1976--1979 collective-bargaining agreement between General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Bellingham Frozen Foods, a Division of San Juan Packers. The bargaining unit work hereunder includes all work done by or for Bellingham Frozen Foods, Inc., on or about the premises and of a nature customarily performed by bargaining unit members, to the exclusion of any extension by third-party contractors, or

their bargaining units, to work other than that specifically contracted for.

WE WILL NOT insist upon the exclusion of seasonal employees from the above-described appropriate bargaining unit or discontinue or change terms and conditions of employment of employees in the above-described appropriate bargaining unit, without first giving notice to and affording the above-named Union an opportunity to bargain about discontinuing or changing those terms and conditions of employment.

WE WILL NOT in any other manner interfere with any of your rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL offer unfair labor practice strikers Marvin W. Eggert, Clarence Estabrook, Marcullus Hertel, Horace

"Jack" Hughes, Henry Jorissen, Jen Kleindel, Clayton Neiuwendorp, Ray Sande, Melvan H. Trueman, and Russell Wilson immediate and full reinstatement to their former positions, dismissing, if necessary, anyone who may have been hired or assigned to perform the work which they had been performing prior to the time that they commenced striking or, if any of their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of our failure to reinstate them on June 24, 1977, when an application for their return to work was received.

WE WILL, upon request, bargain collectively with the above-named Union as the collective-bargaining representative

of the employees in the unit described above respecting rates of pay, wages, hours of employment, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, upon request by the above-named Union, reinstate any terms of employment existing when we took over the processing and packing facility at Squalicum Fill for the employees in the above-described appropriate bargaining unit and make whole the employees in that unit for any losses sustained as a result of our discontinuances or changes in those terms of employment.

WE WILL offer reinstatement to any employees on the 1976 seniority list who would have obtained sufficient seniority ranking during the 1977 processing season to have been entitled to preference

for annual nonseasonal employment, absent our unilateral change in the recall procedure for that season, dismissing, if necessary, anyone who may have been assigned to perform the work that such employees, if any, would have performed but for that change, and make such employees, if any, whole for any loss of pay or benefits they may have suffered as a result of the change in recall procedure.

WE WILL make whole all employees on the 1976 seniority list who would have been, but were not, recalled or who would have been recalled at a time earlier than they were recalled, but for the unlawful change in recall procedure for the 1977 processing season, for any loss of pay or benefits they may have suffered as a result of that change.

A-44

BELLINGHAM FROZEN FOODS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 2948, 915 Second Avenue, Seattle, Washington 98174, Telephone 206--422--7472.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT interrogate you concerning your sympathies and activities on behalf of General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization; tell you that you will be or have been laid off or terminated because we believe that you started an organizing campaign on behalf of the above-named Union or any other labor organization; tell you that we will be angry with you for seeking representation by a labor organization; tell you that we will

fight the above-named Union, or any other labor organization, which you chose as your representative.

WE WILL NOT tell you that your wages and hours will be reduced if you select the above-named Union, or any other labor organization, as your representative.

WE WILL NOT tell you that you are being subjected to more stringent working conditions or that your working hours will be reduced to the point where you will be forced to quit because you have selected the above-named Union, or any other labor organization, as your representative.

WE WILL NOT discharge or otherwise discriminate against you with regard to your hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of the

above-named Union, or any other labor organization, or for engaging in activity protected by the National Labor Relations Act.

WE WILL offer Lillian Huber immediate and full reinstatement to her former position, dismissing, if necessary, anyone who may have been hired or assigned to perform the work which she had been performing prior to the time that she was terminated on September 19, 1975, or, if her former position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and, jointly and severally, make her whole for any loss of pay she may have suffered as a result of the discrimination practiced against her by Bellingham

Frozen Foods, a Division of San Juan Packers.

BELLINGHAM FROZEN FOODS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

BELLINGHAM FROZEN FOODS, A DIVISION OF SAN JUAN PACKERS
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 2948, 915 Second Avenue,

Seattle, Washington 98174, Telephone 206--422--7472.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

BELLINGHAM FROZEN FOODS,
A DIVISION OF SAN JUAN
PACKERS 1/

and Case No. 19-CA-8086

GENERAL TEAMSTERS, WAREHOUSE, FOOD PROCESSING & CANNERY WORKERS & PUBLIC EMPLOYEES LOCAL UNION NO. 231, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA 2/

BELLINGHAM FROZEN FOODS,
INC.

1/ Amended to reflect the correct name, based upon the evidence adduced at the hearing.

2/ Amended to conform to the correct name of the Union as stipulated by the parties at the hearing.

and Case No. 19-CA-9603

GENERAL TEAMSTERS, WAREHOUSE, FOOD PROCESSING & CANNERY WORKERS & PUBLIC EMPLOYEES LOCAL UNION NO. 231, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Timothy D. Nelson, and Gretchen H. Lumbley, of Seattle, Wash., appearing for the General Counsel.
Vance, Davies, Roberts, Reid & Anderson, by George H. Davies and Herman L. Wacker, of Seattle, Wash., appearing for the Charging Party.
Lane, Powell, Moss & Miller, by Eugene R. Nielson, of Seattle, Wash., appearing for Bellingham Frozen Foods, Inc. 3/

3/ Although an answer was filed on behalf of Bellingham Frozen Foods, a Division of San Juan Packers, no appearance on behalf of that entity was made at the hearing.

DECISION

Statement of the Case

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Bellingham, Washington, on November 15 through 18, 1977.4/ On November 18, 1975, the Acting Regional Director for Region 19 issued a complaint and notice of hearing in Case No. 19-CA-8086, based upon an unfair labor practice charge filed on October 15, 1975, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C., sec. 151, et seq., herein called the Act. On July 27, the Regional Director for Region 19 issued a complaint and notice of hearing in Case

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4/ Unless otherwise stated, all dates occurred in 1977.

No. 19-CA-9603, based upon an unfair labor practice charge filed on June 22, as amended on July 26, alleging violations of Section 8(a)(1), (3) and (5) of the Act. On August 17, the said Regional Director issued an order consolidating cases and notice of consolidated hearing, ordering that Cases Nos. 19-CA-8086 and 19-CA-9603 be consolidated for the purposes of hearing, rulings and decision by an Administrative Law Judge.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs filed on behalf of the parties, and upon my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Bellingham Frozen Foods, a Division of San Juan Packers, herein called Respondent San Juan, has been a Washington corporation which, prior to April, maintained an office and place of business at Bellingham, Washington, where it had been engaged in the business of frozen food processing. During the 12-month period preceding November 28, 1975, a period which is representative, Respondent San Juan sold and shipped from its Bellingham plant finished products valued in excess of $50,000 directly to points outside the State of Washington and, additionally, during that same period, purchased and caused to be transferred and delivered to its Bellingham plant, goods and materials valued in excess of $50,000 which were transferred

to said plant directly from states other than the State of Washington. Therefore, I find that at all times material Respondent San Juan has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

At all times material since April 4, Bellingham Frozen Foods, Inc., herein called Respondent Bellingham, has been a Washington corporation with office and place of business located at Bellingham, Washington, where it has been engaged in the business of processing, freezing and repacking vegetable products for resale to food supply businesses from its leased facilities located in Squalicum Fill in Bellingham. During the year preceding April 1, the date upon which Respondent San Juan ceased operations at Squalicum Fill, Respondent San Juan realized gross business revenues in

excess of $500,000 from the sale of vegetable products and, further, sold and shipped products valued in excess of $50,000 directly to customers located outside the State of Washington, or to customers within the State of Washington who, in turn, made sales valued in excess of $50,000 directly to customers located outside the State of Washington. On a projected basis, at the completion of its first full year of operations from the Squalicum Fill facilities, Respondent Bellingham will derive gross revenue in excess of $500,000 and, additionally, will sell and ship products valued in excess of $50,000 directly to customers outside the State of Washington or to customers within the State of Washington who, in turn, will make sales valued in excess of $50,000 directly to customers located outside the State of

Washington. Therefore, I find that at all times material, Respondent Bellingham has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

At all times material, General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Issues

1. Whether between July and September, 1975, Respondent San Juan, through General Manager Gary Tripp interrogated employees concerning their

union activities and sympathies, threatened employees with reprisals should they select the Union as their bargaining representative, told employees that they were to be subjected to certain work restrictions and loss of benefits both because they had selected the Union as their bargaining representative and in an effort to force them to quit due to a reduction in wages and hours, and told an employee that she was to be laid off because Respondent San Juan viewed her as the instigator of union activities, in violation of Section 8(a)(1) of the Act?

2. Whether Lillian Huber was terminated in September 1975 and denied reinstatement thereafter because of her activity on behalf of the Union and because of her protected concerted activity for the purpose of collective

bargaining and mutual aid and protection, in violation of Section 8(a)(3) and (1) of the Act?

3. Whether, upon commencing operations at Squalicum Fill, Respondent Bellingham violated Section 8(a)(5) and (1) of the Act by refusing to continue recognizing the Union as the representative of the employees in the historic bargaining unit and by making changes in certain terms and conditions of employment without prior notification to the Union and without affording the Union an opportunity to bargain concerning these changes?

4. Whether a strike of employees, commencing on May 16, was an unfair labor practice strike and whether Respondent Bellingham violated Section 8(a)(5), (3) and (1) of the Act by failing and refusing to reinstate the following

employees after the Union had made an unconditional offer to return on their behalf: Marvin Eggert, Clarence Estabrook, Marcellus Hertel, Horace "Jack" Hughes, Henry "Hank" Jorissen, Ken Kleindel, Clayton Neiuwendorp, Ray Sande, Melvan H. Trueman and Russell Wilson?

5. Whether in May, Respondent Bellingham, through Tripp, violated Section 8(a)(1) of the Act by telling a striking employee that if the employees failed to accept Respondent Bellingham's outstanding contract proposal, Respondent Bellingham would never sign a contract?

IV. The Alleged Unfair Labor Practices

A. Operations at Squalicum Fill

Since 1948, Bellingham Cold Storage, herein called BCS, has leased an area in Bellingham known as Squalicum Fill from the Port of Bellingham. In 1965, BCS

constructed a frozen foods processing and packing plant there, which, since that time, it has leased to a successive number of firms. Thus, Respondent San Juan had become the lessee in 1974 and, after it had encountered financial difficulties, operated the facility as debtor-in-possession from February until April 1 when Respondent Bellingham bid successfully for the assets and leasehold.5/ Respondent Bellingham commenced operating the Squalicum Fill facility on

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5/ In point of fact, the successful bid in the bankruptcy proceeding had been that of Frank C. Brooks, one of Respondent Bellingham's owners, who had then transferred the assets and leasehold to Respondent Bellingham.

April 4, save for the repack portion6/ which Respondent San Juan was permitted, by arrangement through the Bankruptcy Court, to continue operating until existing commitments had been fulfilled.

Except for discontinuance of berry processing, operations at Squalicum Fill have been conducted in the same fashion since the facility opened, with peas, beans, corn and carrots being processed and packed there. In early July, pea processing is initiated, lasting until

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6/ Because not all of a crop can be consumed by the public at the time that it is harvested, crops processed but not needed for immediate sale are stored in bulk. As needed during the off season, they are repacked in smaller containers, suitable for resale to the public in markets and bearing the name of one of the various retailers under contract with the processor.

the latter part of August. Bean processing begins in early to mid-August and lasts until early to mid-September. Corn processing commences in early to mid-September, depending upon the locations of the growers from whom the corn is obtained, and culminates in early November. Prior to 1976, carrot processing did not begin until mid-October. However, according to Gary Tripp, general manager for both Respondents, customer complaints regarding the late start led to a decision in that year to commence processing carrots in mid-September. The processing of carrots ends in late November or early December. Thereafter, the processing lines remain idle until the following season with only repack operations and maintenance work, divided into plant maintenance and farm shop

maintenance, being conducted at the plant in the off season.

This production process results in a variance in the employment complement over the course of the year. Thus, during the off season, there would be employed between 10 and 20 repack employees. Additionally, approximately 10 employees would be employed in plant maintenance, maintaining the idle production lines, and a like number would be employed in the farm shop, maintaining the equipment used in harvesting. According to Tripp, once pea-processing began, 20 to 30 processing employees would be hired and an additional 60 to 70 employees are added to process beans. Sixty employees, working on two shifts, are employed during the corn-processing season and, to process carrots,

35 employees are required on each shift.7/

B. The Bargaining History at Squalicum Fill

As a result of a card check leading to voluntary recognition, the Union became the representative of a unit of

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7/ These figures do not take into account field employees who are hired to harvest the crops, since they are not included in the bargaining unit and are not involved in this proceeding.

employees8/ in 1966. Since that time, the Union has continued to represent the employees in that same unit without

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8/ As described in the most recent collective-bargaining agreement executed September 23, 1976, the historical bargaining unit has been:

> . . . all employees performing work in the Company's processing plants and warehouses located in Bellingham, Washington or in sheds or lots adjacent thereto where commodities or materials are processed or stored, except: office employees, superintendents; foremen having the power to hire and discharge; regular weighmasters and fieldmen; and _____, who are excluded from the terms of this Agreement, except as provided in Article IX Section 9. The bargaining unit work hereunder includes all work done by or for the Company on or about the premises and of a nature customarily performed by bargaining unit members, to the exclusion of any extension

interruption, until Respondent Bellingham began operating the facility, notwithstanding the intervening changes in the identities of the employers leasing the Squalicum Fill plant.

Article IX of the most recent agreement provides for creation of

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(footnote 8 continued)

> by third-party contractors, or their bargaining units, to work other than that specifically contracted for.

In essence, this unit has included seasonal and year-round employees, engaged in repack operations, processing, plant maintenance and farm shop maintenance, with a separate addendum-form agreement being executed with respect to the farm shop employees to account for certain factors unique to those employees. Since this unit is historical in nature and has not been shown to be repugnant to Board policy nor to hamper employees in the exercise of rights guaranteed them by the Act, I find that it is an appropriate bargaining unit. See, e.g., National Gypsum Company, 220 NLRB 551, 555 (1975).

seniority lists, reflecting the historical practice of maintaining a seniority list for recall of seasonal employees. At the end of each season, such a list has been prepared. The most senior employees were afforded the opportunity to accept nonseasonal employment, such as in repack. The remaining employees were then listed in order of seniority and, prior to commencement of the following season, cards were mailed to the employees on the list, inquiring as to their

availability.9/ Those who responded and those who had been employed in nonseasonal

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9/ Although Tripp testified that cards had not been sent out in 1976, no other witness corroborated him in this regard. Conversely, Marven K. Eggert, the Union's secretary-treasurer, testified that such cards had been sent out before every processing season in each year prior to 1977. Eggert's testimony in this regard was corroborated by Gertie Jorgensen, who had worked in the office at Squalicum Fill since 1966 and who had been, therefore, involved directly in the preparation and mailing of the cards. Contrary to Tripp, Jorgensen testified specifically that such cards had been sent to employees on the seniority list prior to the 1976 season. In view of the absence of any corroboration for Tripp's assertion that the cards had not been mailed in 1976, the favorable demeanor of Eggert and Jorgensen, and Jorgensen's familiarity with what the office employees had done in 1976, I credit Eggert and Jorgensen. Consequently, I find that, consistent with past practice, such cards were mailed in 1976.

employment were then called for processing jobs in order of their seniority. As this process has been repeated for a number of years, there are employees on this list with a long history of seasonal employment at Squalicum Fill.10/

With regard to the office clerical employees, a very short bargaining history has existed. Dissatisfaction with the amount of the spring 1975 wage increases accorded by Respondent San Juan had led office employees Jorgensen, Dan Heaton, Terri Cowles and Lillian

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10/ Illustrative of this are Russ Wilson and Frances Kildall, who were first employed by Lynden Berry Growers in 1959 and 1958, respectively. In 1967, Clarence Estabrook, Ken Kliendel, Elmer Lee, Dorothy Crump, Joan Puller, Mildred Grout and Marian McIvor had all started work at Squalicum Fill. There are over 90 employees whose original hire dates were prior to the 1975 season.

Huber to sign cards authorizing the Union to represent them. On July 12, 1975, Eggert11/ had come to Squalicum Fill where he spoke with Tripp, demanding recognition on the basis of the cards. Ultimately, this issue was resolved on September 4, 1975, when the clerical employees selected the Union as their representative in a Board-conducted election. However, on September 19, Huber, who had been a seasonal clerical, was directed to cease reporting for work. Thereafter, she did not again work at Squalicum Fill.

11/ Eggert's nephew, Marvin W. Eggert, was employed by Respondents. To distinguish between them, the Union official will be referred to herein as "Eggert" and the nephew as "M. W. Eggert."

The General Counsel alleges that Respondent San Juan had acted toward Huber for motives unlawful under the Act. Conversely, Tripp testified that Huber's layoff had been motivated solely by the fact that in mid-September 1975, BCS vice-president Martin Asplund had notified Respondent San Juan that BCS would be unable to provide the cold storage capacity needed for the carrots which Respondent San Juan planned to process. Consequently, testified Tripp, Respondent San Juan had informed its growers that it would be unable to accept their carrots until it had finished processing corn and, additionally, had advised a number of employees, who had anticipated starting work within a short period of time, that there would be no job opportunities for them until the conclusion of the corn season. According

to Tripp, the BCS announcement reduced the number of seasonal employees that would be needed by approximately 60 percent. This being true, he testified, only the top seniority people would be working, with little need to call individuals or to set up crews which had been the work that Huber had been performing. Thus, testified Tripp, Respondent San Juan had terminated Huber and upon conclusion of the corn season, had switched the existing employees to carrot processing.

Several infirmities, however, are presented by this defense. Most prominent is the fact that it relies entirely upon the testimony of Tripp. No documentation was presented to support the fact that there had been notification given to growers with respect to the purported delay in carrot-processing in 1975. Nor

was documentation provided to substantiate the contentions that there had been such a delay or a reduction in the complement of seasonal employees during that season. Moreover, neither Asplund nor any other official of BCS was called to corroborate Tripp's testimony that Respondent San Juan had been notified of a shortage of storage space or that, in fact, such a shortage had existed. Further, while Tripp also testified that following his conversation with Asplund he had discussed the problem with Respondent San Juan's officials, naming specifically Nicholas MacPhee as being among that group of officials with whom he had spoken, and although MacPhee appeared as a witness during the hearing, MacPhee did not corroborate Tripp's account of this purported conversation. To the contrary, MacPhee gave no testimony that would

support Tripp's assertion that there had been a shortage of storage space for carrots in 1975. Accordingly, not only was Tripp's account of the purported shortage uncorroborated, but, beyond that, the failure to produce witnesses, testimony and other evidence to support his testimony warrants the inference that had such evidence been produced, it would not have supported the account advanced by Tripp. Colorflo Decorator Products, Inc., 228 NLRB No. 53, slip op. JD at 5 (1977); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. N.L.R.B., 459 F.2d 1329, 1335-1338 (C.A.D.C. 1972).

There were also certain discrepancies in Tripp's story concerning Asplund's supposed call. Foremost was his contention that Asplund had made the call

in mid-September, giving rise to the need to take action immediately because of the imminency of carrot processing. Yet, as set forth in Section IV, A, supra, by Tripp's own testimony, it was not until 1976 -- 1 year after Huber's termination -- that Respondent San Juan had begun processing carrots before mid-October. Thus, there was no need to react so immediately to Asplund's announcement, assuming it had been made, since almost a month remained until the processing of carrots would commence. Moreover, he did not dispute Jorgensen's testimony that there had been prior occasions when shortages of cold storage had arisen without reduction in the office staff. Yet, he did not explain why, contrary to past practice, it had been necessary to lay off Huber in 1975.

Those infirmities in Respondents' defense to Huber's termination give rise to suspicion that her termination had been motivated by a reason other than the one advanced by Tripp at the hearing. That this was a reason unlawful under the Act is shown by several factors.

First, Respondent San Juan had been opposed to unionization of the office employees. It is undisputed that after Eggert had departed on July 12, 1975, Tripp had asked Huber and Cowles if they were certain that they wanted him to relay Eggert's demand letter to MacPhee, adding that they had best make "damn sure" they knew what they were doing as MacPhee and Dave Schink, formerly an owner of San Juan Cannery which had been merged into Respondent San Juan, did not want to be crossed and were not going to take it well. When Tripp then repeated

his question, the two clericals affirmed that they wanted him to transmit the demand letter to MacPhee. Later that same day, Cowles and Huber inquired if Tripp had given the letter to MacPhee. It is undenied that Tripp replied that he had done so, that he had never seen MacPhee so mad as he had been when he had received the letter, and that the clericals had best be sure that they knew what they were doing since Respondent San Juan intended to fight it all the way.12/

12/ While MacPhee did appear as a witness -- and, thus, was obviously available for Respondents to recall following the employees' appearances -- Respondent did not call him to controvert Tripp's statements which were, after all, admissions as to MacPhee's statements and sentiments concerning unionization of the office employees. Federal Rules of Evidence, Rule 801(d)(2)(D) and Advisory Committee's Note thereto.

Nor did Respondent San Juan's hostility toward the Union representing the office employees abate as the summer passed. Instead, it is not denied that during August 1975, Tripp had directed a number of comments to the clericals to the effect that should the Union prevail in the election, Respondent San Juan would probably negotiate the same contract as the Union had with another employer and under the terms of that contract, employees received wages no higher than those of Huber, with the result that the other office employees would probably have their wages reduced. In one of these conversations, he also threatened that Respondent San Juan would shut the office on weekends before paying overtime to Cowles and Jorgensen.

Passage of the election did not change Respondent San Juan's attitude. Following the Union's victory on September 4, 1975, it is uncontroverted that Tripp had told Huber that he was surprised that the Union had prevailed, as Respondent San Juan had expected the opposite result, and that while he personally did not care if the office was unionized, he would now have to monitor the employees to justify such things as their overtime, daily arrival and departure times, days' off and similar matters. He also said that in the winter, when no processing was in progress, Jorgensen and Cowles' hours would probably be cut to a 4-day workweek to conform to the work available. His comment regarding more stringent observance of work time was emphasized on Monday, September 15, 1975, when he distributed job sheets, telling the

clericals that they would have to complete them for a 1-month period to justify employing so many people in the office.

By these comments and conduct, Respondent San Juan demonstrated its general hostility toward the Union. They also demonstrated that it was not reluctant to resort to unfair labor practices to implement that hostility. Tripp's questions regarding the strength and depth of the clericals' support for the Union on July 12, 1975; his threats that MacPhee and Schink would be angry at the office employees for seeking representation and would seek to fight it all the way; his warnings regarding pay and hour reductions in the event that the employees selected the Union as their representative; and his post-election announcements regarding more

stringent observation of employees' working hours and a reduction in winter worktime, coupled with distribution of the job sheets accompanied by the implied warning that there might be a reduction in the number of office employees, all violated Section 8(a)(1) of the Act, since they were motivated by Respondent San Juan's hostility toward unionization of these employees. Consequently, Respondent San Juan demonstrated both hositility toward the Union and willingness to violate the Act -- both to prevent unionization initially and, ultimately, to retaliate against the employees for selecting the Union as their representative.

Furthermore, it is clear that Huber had become the specific object of Respondent San Juan's hostility due to its belief that she had instigated the

Union's organizing campaign. Thus, it is undenied that on September 16, 1975 -- 3 days before her termination -- Tripp had said that MacPhee and Schink felt that Huber had instigated the campaign because everything had been fine in the office until her return to work. Tripp also related that Schink had inquired how soon Respondent San Juan could get rid of Huber because of her union activity. Accordingly, it is clear that Huber had become the object of Respondent San Juan's suspicions concerning the identity of the leading Union proponent and that Respondent San Juan intended to terminate her because of that fact at the earliest possible moment.

Any assertion that Huber's work was less than adequate is dispelled by Tripp's undisputed response to Huber's query concerning this subject on September 16,

1975, when he told her that there was nothing wrong with her work, that he thought that she did a fine job and that he felt lucky to have someone with her experience to help in the summers. During this same conversation, however, he added that MacPhee and Schink did not want to be crossed with the result that the employees would be sorry for their union activity as, come winter, the reduced workload would occasion a reduction in Jorgensen and Cowles' working hours which, since they both depended upon their incomes for a living, would probably lead them to quit. It was just this result, asserted Tripp, that was sought by Respondent San Juan. This comment, of course, constitutes an additional violation of Section 8(a)(1) of the Act, since it constitutes a threat of retaliation against employees

for selecting a collective-bargaining representative.

It also demonstrates that Respondent San Juan's animus was not simply an emotional outburst that might abate with the passage of time. Rather, it shows that Respondent San Juan was in the process of formulating a careful plan, of greater than short-range duration, with the ultimate objective of disposing of employees who had voted for the Union. It also shows that Respondent San Juan was seeking circumstances that would afford it the opportunity to dispose of the Union's supporters. Consequently, even had there been evidence of a problem obtaining sufficient cold storage space, the evidence that such a problem had occurred in the past without office employees being laid off makes it apparent that Respondent San Juan had

simply seized upon this problem as a vehicle for implementing its desire to dispose of Huber because it suspected her of having initiated the organizing campaign.

Therefore, a preponderance of the evidence shows that Respondent San Juan harbored animus toward the Union and its supporters, that it was not reluctant to resort to unfair labor practices in an effort to defeat the Union's organizing effort, that it was later willing to resort to similar conduct to retaliate against the employees' employment in its retaliatory campaign, that it suspected Huber of being the employee who had initiated the Union's campaign, that it desired to terminate her because of that suspicion, and that the defense presented to justify her termination was uncorroborated, unreliable and inconsistent. In

these circumstances, I find that the termination of Huber violated Section 8(a)(3) and (1) of the Act.

Although it is undisputed that Huber has been offered employment with Respondent San Juan in the spring of 1976, there is no evidence that this offer rose to the level of an offer of reinstatement which, since she was a discriminatee, was owed to Huber by Respondent San Juan. Consequently, this offer is not sufficient to serve as an offer of reinstatement which would toll the backpay owed to Huber. See D.R.C., Incorporated, et al., 233 NLRB No. 201, slip op. JD at 25 (1977), and cases cited therein.

Before departing the issue of Huber's discharge, note must be taken of the belated contention that Huber had been a supervisor within the meaning of

Section 2(11) of the Act during her employment with Respondent San Juan. The only evidence presented to support this contention pertained to Huber's duties in calling processing employees to work during the season. It was provided by Tripp, who was a less than impartial witness. As set forth above, seasonal employees were called initially by resorting to the seniority lists. Once these names were exhausted, the office employees -- Jorgensen, Cinda Knutsen and Huber in 1975, prior to the latter's termination -- then resorted to applications filed by persons who had never been employed by Respondent San Juan. In contacting these employees, the office employees followed the order of the dates upon which these applications had been filed. Accordingly, this process provided no leeway for any of

these employees, including Huber, to exercise independent judgment.

Tripp, however, testified that discretion had been exercised by Huber in determining whether to accept applications for employment. Thus, he testified, in most general terms, that Huber or whoever accepted an application had been responsible for interviewing the applicant and for making the decision as to whether the applicant possessed the qualifications to work for Respondent San Juan. Huber, conversely, denied ever having been instructed to interview applicants and, further, denied having ever interviewed any applicant.

Respondents produced neither concrete illustrations of such interviews nor evidence that would support Tripp's testimony regarding the office employees' purported responsibilities for interviewing

applicants. Indeed, when asked specifically what information would have been sought in such interviews, Tripp responded vaguely, "Probably previous experience in a processing plant" and "I would imagine they would speak a few words with them and evaluate them." Again, however, no evidence of any such "evaluations" was provided and it is difficult to ascertain what type of evaluation could have been adduced that would have any bearing on the jobs which were available. For, as Hayes, himself, pointed out, "You arent' hiring a PhD to run a university."

In the final analysis, Tripp, in effect, retracted his own testimony regarding Huber's purported supervisory authority, as he acknowledged that the office employees had not been given any instructions with respect to applicants

that they should not accept, conceded that these employees would have been willing to accept anyone who did apply based upon "the supply and demand," and responded affirmatively when asked if it were not true that the extent of the clericals' responsibility with regard to hiring applicants had been "to get on the phone and ask them if they could come to work?" I find that Respondents' defense concerning Huber's asserted supervisory authority -- a defense raised elsewhere, as discussed supra, and seemingly whenever Respondents appeared to feel that it might gain them a tactical advantage -- is not supported by a preponderance of the evidence. Accordingly, I find that Respondents have failed to show that Huber was a supervisor within the meaning of Section 2(11) of the Act.

C. The Events Surrounding Respondent Bellingham's Commencement of Operations

Hayes testified that after discussing with Brooks their lack of knowledge of the terms of Respondent San Juan's contract with the Union, he had contacted Eggert to discuss the matter. The meeting was held on March 16.13/ Hayes explained that his group was in the process of purchasing the Squalicum Fill operation and said that he understood

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13/ This is the date that Eggert testified that the meeting had occurred. Although Hayes testified initially that the meeting had occurred on April 1, he appeared uncertain of the date and conceded that the meeting could have occurred on March 16. Accordingly, I credit Eggert's testimony in this regard.

that the Union had a collective-bargaining agreement covering that facility. Eggert confirmed that fact. Hayes then said that he felt that Respondent San Juan's difficulties had arisen due to abuses by personnel and that there were "some" employees on the seniority list whom Respondent Bellingham might not want to recall because of their prior inadequate performance. Eggert pointed out that due to the number of years that the seniority list had been in existence, poor performers had probably been eliminated. However, he added that he was willing to discuss any specific employees whom Respondent Bellingham felt might pose problems and was certain that understandings could be reached with regard to them. Hayes then stated that Respondent Bellingham desired to bring in its own office clerical employees.

Eggert replied that to a degree, this would not be objectionable, for, while it had a contract covering the current office complement, Heaton was planning to retire from full-time employment and Cowles had seniority in the processing phase of the Squalicum Fill operations. Thus, continued Eggert, the only problems would be the employee who had been terminated by Tripp for union activity, which had led the Union to file an unfair labor practice charge,14/ and Jorgensen, who would need protection as, unlike Cowles, she lacked seniority for processing. Hayes said simply "We will consider it."

14/ Huber was not mentioned by name during the meeting.

The meeting concluded with Hayes promising to again contact the Union after conferring with his group and ascertaining their intentions with respect to the operation. Hayes did not claim that during this meeting he had disavowed possessing authority to recognize or bargain with the Union. There is, moreover, no evidence that he had made any statements concerning the scope of the unit for which the Union was the representative. In fact, there is no evidence that he had ever said during the meeting that he was not affording recognition to the Union, although he did characterize their March 16 discussion as "exploratory talks." On the following day, the Union transmitted a

copy of its collective-bargaining agreement to Hayes.15/

No further communications occurred between the Union and Respondent Bellingham prior to the latter's commencement of operations at Squalicum Fill on April 4. So far as the employees were concerned, the change in ownership had no effect on them. Respondent San Juan never told

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15/ While Hayes testified that he did not recall having asked for a copy of the contract and thought that the Union had simply transmitted it voluntarily, Eggert recalled that Hayes had called the following day to request a copy of the contract. I credit Eggert's testimony in this respect, for he appeared to be a candid witness. Hayes' recollection on this point was obviously hazy, and, since Hayes' objective in holding the meeting had been to ascertain the terms of the Union contract with Respondent San Juan, such a request would have been consistent with that objective.

them that they were terminated and the entire complement -- save, of course, the repack employees -- resumed working on Monday morning, April 1, for Respondent Bellingham, without having to complete applications for employment or other paperwork. Hayes did meet with them that morning, but the message he conveyed was confined to an appeal to get the equipment ready for the processing season and an assurance that they would continue to be paid at the same rates and that their paychecks would be honored. Indeed, Hayes conceded that no pre-takeover changes in terms and conditions of employment had been planned or formulated. Hayes also conceded that Respondent Bellingham had received the 1976 seniority list when it had commenced operations at Squalicum Fill.

D. Events Leading to the May 16 Strike

On April 10, Respondent Bellingham eliminated the morning and afternoon breaks which employees had traditionally received, substituting an 8 percent across-the-board pay increase. Similarly, Respondent Bellingham eliminated the practice of paying a 15 cent-per-hour premium rate to certain employees designated as "key employees." Finally, upon ascertaining that state law required break periods, Respondent Bellingham restored these break periods on April 14, but reduced them by 5 minutes in duration. At no point did it notify the Union of these changes nor did it afford the Union an opportunity to bargain about them. So far as the record discloses, the decisions to make these changes were all made following Respondent Bellingham's

commencement of operations and not prior to its takeover.16/

On April 14, Hayes again met with Eggert, this time at the latter's request. Eggert referred to Respondent San Juan's delinquency in pension payments and in health and welfare contributions. Hayes states that while Respondent Bellingham foresaw no problem in the area of health and welfare, the 7-1/2 cents-per-hour pension contribution for seasonal employees was "ridiculous." When Eggert explained that it was not possible to

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16/ Thus, farm shop employee Mark Likkel testified that when Field Shop Supervisor Bill Hunt had called him prior to April 4, requesting him to come to work for Respondent Bellingham, Hunt had said only that "the company was considering an eight per cent raise in lieu of coffee breaks." (Underscoring supplied.)

distinguish between seasonal and non-seasonal employees with regard to pension payments, Hayes retorted "we're not going to have a contract for seasonals anyhow, at least this season." When Eggert then mentioned having heard rumors regarding the 8 percent wage increases and elimination of breaks, Hayes acknowledged that these changes had been made. Eggert pointed out that the Union had not decided what to do regarding these changes and that the membership would have to vote on them. In response, Hayes questioned Eggert's reasoning, saying "we don't have [a] contract with you."

A brief discussion then ensued regarding not recalling some seasonal employees and Eggert again pointed out that the Union was willing to discuss those individuals who posed problems for

Respondent Bellingham. Hayes then said that Norm Coker was to be hired to take charge of the maintenance operation. When Eggert inquired what would then happen to his nephew, Hayes replied that he thought that the younger Eggert would be placed in charge of the shop, with Coker supervising the maintenance and production operation. The meeting concluded with Hayes saying that Respondent Bellingham had its own operation and was not interested in becoming involved in an "industry contract situation," as had been the case with Respondent San Juan, and with Eggert promising to revise the contract, so that it would be tailored to Respondent Bellingham's operation, and to submit the revised copy.

On April 19, Eggert dispatched the revised contract and trust documents to

Hayes, with a covering letter stating that the initial fringe benefit contributions would cover only the plant and field maintenance employees, as "the seasonal employees will not be on the payroll until late June or early July," and requesting information pertaining to the change in break periods, since "a sufficient amount of confusion exists among the crew to warrant a clarification." In response, Hayes transmitted a letter to Eggert 3 days later, stating:

> In response to your letter of April 19th, I wish to point out that Bellingham Frozen Foods is a brand new organization. We neither assumed the existing San Juan labor agreement nor would we be considered as a successor to the San Juan operations.
>
> As noted in your letter, we have at this time hired only maintenance employees who constitute a very small fraction of the work force comprising the former bargaining unit. Therefore, it may not

> be possible to determine until we have hired our full complement of employees whether Teamsters Local Union 231 is in fact the bargaining representative representing a majority of the employees in the unit.
>
> As I previously told you, we are feeling our way along in a number of situations. Obviously, we want to be cautious about making any long - term commitments in a hasty fashion. Under the circumstances, we do not feel that the negotiation of a labor agreement with your union is either mandated or desirable for our company at this time.

This message was emphasized by co-owner Dick Metcalfe's undisputed comment to Eggert on April 29, when asked by Eggert about the reason for the difficulty, that "Well, the problem is we want to go non-union."

The parties met subsequently throughout the months of May and June, ultimately with the Federal Mediation and Conciliation Service attempting to mediate the dispute.

However, Respondent Bellingham's unwillingness to recognize the Union as the employees' bargaining representative persisted, although it did modify its position by expressing willingness to recognize the Union as the representative of the nonseasonal employees, if the Union were willing to forego (sic) representation of the seasonal employees. For example, in its proposed contract transmitted to Eggert on May 25, Respondent Bellingham proposed extending recognition to "All non-seasonal employees employed in the plant maintenance, field maintenance or repacking excluding seasonal employees . . . ."

The Union held a series of meetings with the employees in which the progress of the negotiations, including the positions taken on the continued inclusion of seasonal employees in the bargaining

unit, was reviewed thoroughly. The employees supported the Union's position that these employees should continue to remain a part of the bargaining unit, consistent with the scope of the historical unit, and this issue was a significant factor both in the inability of the parties to achieve agreement on the terms of a contract and in the Union and employees' decision to commence striking on May 16. All employees at Squalicum Fill, including the repack employees who were still working for Respondent San Juan, observed the picket line, at least during the early days of the strike.

E. The Events During the Strike

Although the parties continued to meet following commencement of the strike, there was no change in their positions concerning the continued

recognition of the Union as the representative of a combined seasonal and nonseason employee unit. Certain other events also occurred.

First, by letter dated May 20, Respondent Bellingham, which had been making no payments to the various trust funds to which Respondent San Juan had been obligated to make payments under its contract with the Union, notified the Union that it was placing into effect temporary health coverage for the employees under the "High Option Plan" of the Whatcom County Physicians Service, Inc., although it pointed out that the subject of health coverage would remain open for negotiation. In addition, without consulting with the Union and without affording it an opportunity to bargain concerning the matters, Respondent Bellingham, in June, formulated the

terms of employment for the seasonal employees who were soon to be recalled. Among the employment terms established were higher pay rates. Further, no contributions were to be made on behalf of seasonal employees to the pension and health and welfare funds.

Second, at some point during the early phase of the strike, Tripp invited Likkel to return to work, telling Likkel that the employees who continued to strike could not be assured that jobs would be waiting for them after the strike was settled, that Respondent Bellingham's latest proposal was a good offer and that if this proposal "was not

accepted by the employee, then there would probably be no contract at BFF."17/

Third, Respondent Bellingham hired replacements for some of the striking employees and some of the striking employees resumed work. On June 24, Eggert dispatched a letter to Respondent Bellingham, stating, inter alia:

17/ Likkel denied categorically that Tripp had said either that if the employees "didn't accept the contract, that the company was just going to hang on and keep proposing the same contract" or that "the company was not going to move away from what it offered or had offered."

> This is to advise you that all employees of Bellingham Frozen Foods, Inc., who were employed on or about May 16, 1977, the date we first commenced picketing, unequivocally offer to return to work.
>
> In addition, we advise you that all seasonal employees who have worked in the past and who would appear on the seniority list in effect at the time of the takeover by your company (for your information a copy of such list is enclosed), are ready and willing to work, and are awaiting your call.

Immediately upon receipt of this letter, Hayes responded with a letter of his own:

> In reply to your letter of June 24, 1977, all employees on strike have been permanately [sic] replaced except for Marc Likkel, Elmer Beck, Gregg Dupraw, Clinton DeFries, Richard Alaniz, and Jack Dupraw. Please request their return to work Monday, June 27, at 7:00 A.M. As openings occur, in non - Seasonal [sic] positions, reemployment will be offered to the remaining strikers. If any of the remaining strikers are interested

> in employment in seasonal positions, they should let us know.
>
> Regarding your application for seasonal jobs on behalf of persons formerly employed by San Juan Packers, Inc., we do not recognize any preferential right on their part to employment as seasonal workers for this company based on their past service with San Juan. Many of the persons on the lists you supplied have already made written application to us for seasonal jobs. We ask that you tell all persons on such lists to make written application for seasonal jobs by coming to our office unless they have already done so.

* * * * *

Two points need be made with respect to Hayes' letter. First, regarding the strike replacements, Hayes testified that he had been the official who had selected the strikers who were to be reinstated. However, in doing so, he made no effort to ascertain which replacement had been hired to replace which

striker. Nor did he attempt to determine which of the strikers' jobs were open and available for them to resume work. Instead, he testified, "I knew we had a group that had been replaced and I knew that we had openings that had not been replaced for 6 people so I took the 6 people we felt we wanted, put their names in the letter but I did not get down to the point of this one replaced this one -- and so on."

Second, while the record is somewhat vague as to the precise fashion in which Respondent Bellingham went about hiring seasonal processing employees, Hayes testified that Respondent Bellingham had simply opened up for applications in June. The result of this change in procedure from past years was that of the 211 typed names on the seniority list, 116 did not apply for employment.

Nor was evidence adduced that they would likely have been put on notice to do so under this changed procedure. With regard to those who did apply, Respondent Bellingham convened a meeting of Tripp, Assistant to the President James Robertson, Repack Supervisor Shirley Beaty, and Superintendent Ray Larson. Based upon their familiarity with the employees who had applied, six received adverse ratings and two were determined to be of limited ability. Significantly, however, the fact that adverse ratings were assigned employees did not, of itself, preclude them from employment with Respondent Bellingham, since both Jack DuPraw, Jr., and Eleanor Buchanan were employed by Respondent Bellingham, although DuPraw's employment preceded the strike.

F. The Evolving Employee Complement

1. The Alleged Supervisors

Respondent Bellingham contends that a series of individuals, formerly employees of Respondent San Juan and hired by Respondent Bellingham, are supervisors within the meaning of the Act. However, for the most part only sparse evidence was presented to support these contentions. Most of this evidence was adduced through the testimony of Tripp, whose willingness to participate in antiunion activities was demonstrated in 1975 and the untrustworthiness of whose testimony was displayed in connection with his account of the reason for the termination of Huber. Indeed, the contentions that these individuals are supervisors is reminiscent of Respondent's effort to avoid any finding of a violation of the Act by portraying Huber as a supervisor --

only, here, the object would be to remove these individuals from the computation of the number of employees who had formerly been employed by Respondent San Juan in the bargaining unit. Consequently, in appraising the evidence presented to support these supervisory contentions, care must be taken.

The evidence does appear to support the contention that Superintendent Ray Larson18/ and Repack Supervisor Shirley Beaty have been supervisors within the meaning of Section 2(11) of the Act. Beaty testified that, in June, she had requested of Tripp that she be made

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18/ The General Counsel's brief appears to abandon any dispute which existed previously concerning Larson's supervisory status.

repack supervisor, a nonseasonal position since repack operations are conducted for most, if not all, of the year. A notice "To All San Juan Employees at BFF" was posted announcing that she had "been appointed re-pack supervisor." Thereafter, she acknowledged, she had been in full charge of the repack department, in which, as set forth in Section IV, A, supra, between 10 and 20 employees work. Although called as the General Counsel's witness, she was not recalled to controvert Tripp's testimony that she possessed authority to hire and fire employees. Indeed, she was one of the officials who had participated in reviewing the seniority list and in evaluating the seasonal employees who had applied for re-employment at Squalicum Fill. Accordingly, I find that both Ray Larson and Shirley Beaty have been supervisors

during the time that they have been employed by Respondent Bellingham. However, the evidence does not appear sufficient to support a similar conclusion with regard to the other positions and individuals.

The three processing line supervisors -- Kay Ecalbarger, Don Whitener and Chuck Larson -- are supervised by Ray Larson and, according to Tripp, possess authority to hire and fire employees, to direct the work and change employee work assignments, and to reward and discipline employees. In general, testified Tripp, they are responsible for all operations within the plant during their time on the job. Yet, no specific illustrations of any exercise of these purported powers were supplied by Respondents. Moreover, while Tripp claimed that at the time

that these three individuals had been hired, it had been understood that they would become supervisors once the processing season began, there is no evidence that he had been the one who had spoken to them about their jobs and none of them were called as witnesses to corroborate his testimony in this regard. To the contrary, Tripp acknowledged that it had been Ray Larson who had spoken to Chuck Larson. Yet, while Ray Larson was called as a witness by Respondent Bellingham, he did not corroborate Tripp's account as to what had assertedly been said at the time of Chuck Larson's hiring. Colorflo Decorator Products, supra.

Moreover, as Hayes conceded, work on the processing line is not complicated, but rather appears to be routine. Accordingly, there is no basis for

inferring from the nature of the work that the processing line supervisors would exercise the degree of independent judgment required to establish supervisory status in directing the employees' work and in changing their assignments. See American Lumber Sales, Inc., 229 NLRB No. 66, slip op. JD at 11 (1977). Similarly, Tripp did not describe the manner in which independent judgment was exercised by these three individuals in rewarding and disciplining employees. In light of his descriptions of the manner in which other individuals whom he characterized as supervisors disciplined employees, discussed infra and showing that their actions were no more than recommendations which were not shown to have been given independent weight, I find that Tripp's descriptions of these individuals' purported authorities

does not suffice to establish that they were supervisors.

Tripp's only testimony regarding the authorities of repack line supervisors Mark Howard and Jim Britt was that they lacked authority to hire, fire, or discipline employees, and that they could write a warning slip. However, he did not explain the terms upon which they could do so -- i.e., whether they could do so at their own discretion or only after consulting with their supervisor, Beaty. Moreover, Respondent Bellingham made no effort to question Shirley Beaty about the duties of Howard and Britt, notwithstanding the fact that they are under her immediate supervision. I find the evidence insufficient to establish that Howard and Britt have been supervisors within the meaning of Section 2(11) of the Act.

Similarly, Tripp conceded that shift supervisors, Clint DeFries and Richard Alaniz, had no authority to hire or fire employees. Moreover, most of the supervisory authorities which he attributed generally to them turned out to require Coker's authorization before they were implemented. For example, he acknowledged that the shift supervisors would "undoubtedly" confer with Coker before granting an employee's request for time off. He conceded that any recommendation which they might make would be directed to Coker who would prepare his own recommendation before submitting the matter to Tripp for decision. Since Coker was never called as a witness to support Respondent Bellingham's contention regarding the supervisory authority of the shift supervisors, the record is devoid of a

basis upon which to determine the weight which he would accord to their recommendations.

Similarly, while Tripp claimed that the farm shop shift supervisor had authority to issue warning notices without conferring with Coker, he conceded that such notices would be given to Coker. No testimony was adduced as to the weight accorded such notices by Coker or even as to whether these notices would be included in the employees' records. Moreover, there is no evidence as to the types of warnings that they may issue. See Greenfield Components Corporation, 146 NLRB 757, 759 (1964). That these deficiencies in the record are not simply nitpicking is shown by comparing this authority attributed by Tripp to the farm shop shift supervisor with the authority to temporarily suspend

employees which he attributed to the plant shop shift supervisor. In the latter case, Tripp admitted that to exercise such "authority," the plant shop shift supervisor would first have to obtain the approval of Coker or Assistant Shop Supervisor Stucks before taking any action. Finally, Tripp never did explicate what he meant by his testimony that these supervisors are responsible for maintaining the plant and crews on their shifts. If by this he meant that they assigned work, such an assertion would not suffice to establish the independent judgment requisite to establishing supervisory authority under Section 2(11) of the Act. American Lumber Sales, supra. I find that these individuals are not supervisors.

I also find that the evidence is not sufficient to establish that Assistant

Shop Supervisor Stucks is a supervisor. Tripp's only testimony regarding Stucks' duties was that he is responsible to Coker for supervising the crew and is responsible for operations of the plant shop in Coker's absence. However, there was no explication advanced as to his normal duties -- and, thus, no description of any supervisory authority which he may have possessed -- nor was there any evidence showing that Coker was absent on any regular basis -- and, thus, no evidence that Stucks exercised supervisory authority on any basis other than during sporadic absences by Coker. In fact, there is no evidence that even when Coker was absent, Stucks had exercised the full panoply of supervisory authority which Coker possesses. Consequently, Respondent Bellingham has failed to adduce evidence sufficient to

establish that Stucks possesses authority sufficient to make him a supervisor within the meaning of Section 2(11) of the Act.

Tripp contended that Night Repack Supervisor Jim Yanke possessed authority to hire and fire employees, as well as authority to instruct others to hire and fire employees. However, this testimony was not corroborated by Repack Supervisor Beaty, Yanke's immediate supervisor. Nor did Tripp advance an explanation regarding the basis for his testimony that Yanke possessed such authority. Moreover, no illustrations of Yanke exercising such authority were advanced. With regard to hiring, this is particularly significant inasmuch as the practice of permitting the more senior employees to decide whether they wished to work in repack would appear to preclude

any possibility of Yanke having an opportunity to exercise hiring authority. Finally, while Tripp claimed that Yanke could write a warning slip, no evidence was adduced that such a slip would become part of an employee's personnel file without, at least, submission to his supervisor, as had been the case with the farm shop shift supervisor. Therefore, I find that Respondent Bellingham has failed to produce evidence sufficient to support a finding that Yanke possesses supervisory authority.

Cleaning Supervisor Steve Brown, according to Tripp, supervises the regular cleanup crew of four to eight people during the processing season and of one person during the rest of the year. The only other testimony which Tripp gave regarding Brown was the general assertion that Brown possesses

authority to hire and fire. In view of Tripp's unreliability as a witness and in light of Respondent's general apparent effort to attribute supervisory authority to a number of individuals, without sufficient support to establish that fact, I find that Tripp's testimony is not sufficient to establish that Brown is a supervisor within the meaning of Section 2(11) of the Act. For the same reasons, I find that the record will not support a finding that Shipping and Receiving Supervisor Linda Pennington is a supervisor within the meaning of the Act.

The situation regarding M. W. Eggert is somewhat more involved. Tripp testified that at the time of the strike, M. W. Eggert had been plant shop supervisor, a position in which, testified Tripp, he possessed authority to recommend

hiring and firing, was responsible for directing the work of others, had authority to assign plant shop mechanics to jobs and change assignments, and had authority to discipline employees. Tripp further testified that M. W. Eggert could take such actions on his own without having to clear them with Tripp.

M. W. Eggert testified that he had been promoted to shop foreman in August 1975, a position he was to occupy until the strike commenced on May 16. However, during the second week in April, he was told that he was to be replaced by Coker and that he would be transferred to being plant foreman, due to dissatisfaction with his performance. When he protested to Hayes concerning the change, the latter decided to permit him to remain as shop foreman and to permit Coker to function as general plant foreman.

However, M. W. Eggert was to report to Coker "on anything that was to be done in the plant, or any changes to be made." Thereafter, testified M. W. Eggert, he and Coker had shared an office and job assignments had been discussed between them, although M. W. Eggert was responsible for communicating the decisions to the employees once Coker had decided what was to be done. Coker took over the ordering of supplies and M. W. Eggert had to clear all major decisions through Coker.

Coker was never recalled as a witness to confirm Respondent Bellingham's position and Tripp's testimony concerning M. W. Eggert's purported supervisory authority. This failure to do so gives rise to an inference adverse to Respondent Bellingham's position on this point. Colorflo, supra; United Automobile,

etc. Workers of America, supra. While M. W. Eggert's testimony indicates that he had been a supervisor at one point in time, it appears that Tripp sought to replace him with Coker due to complaints and that only when Hayes intervened -- at a time when, as described in Section IV, D, supra, Secretary-Treasurer Eggert had complained about the younger Eggert's demotion -- was his title restored. Yet, from the description of his duties thereafter, it appears that the title had been divested of authority to exercise any independent judgment and that Coker had not, in fact, retained any meaningful authority that had formerly accompanied that title. Thus, job assignments were discussed with Coker who made the ultimate decision, leaving M. W. Eggert to communicate it to the employees. To the extent that the

latter continued to play a role in these assignments, his testimony that the selection of employees to perform tasks was routine, as all employees are equally qualified, is undisputed. Indeed, it was confirmed by Hayes' testimony that, "A good mechanic can work anyplace." Consequently, there has been no showing that M. W. Eggert exercised independent judgment in making such assignments. See Medicine Bow Coal Company, 217 NLRB 931, 938 (1975).

While he testified that he was responsible for ensuring that assignments were carried out properly and for checking from time to time to ascertain if employees were encountering difficulties, M. W. Eggert testified that he had taken such actions from a mechanical standpoint, based upon his experience with the work to be performed. Consequently, his

responsibilities in this respect "partake more of an inspection function by a more experienced employee than of a supervisor." American Lumber Sales, supra, JD at 11. Consequently, at most the evidence adduced by Respondent Bellingham shows that M. W. Eggert may have been a supervisor prior to his April demotion, but that thereafter, his authority was carefully circumscribed and he no longer possessed any of the indicia of supervisory authority, accompanied by ability to exercise independent judgment.

Tripp testified that Horace "Jack" Hughes had been M. W. Eggert's assistant. However, Tripp conceded that Hughes lacked authority to hire or fire. When asked if Hughes had possessed authority to discipline employees, Tripp responded only "Probably through Marv Eggert." Even assuming that M. W. Eggert had

remained a supervisor until the strike, such testimony is entirely too vague to establish that Hughes possessed disciplinary authority. Tripp admitted that Hughes could not issue warning slips "on his own." While Tripp did claim that Hughes had authority to direct the work of plant shop employees, to assign tasks to them and to change their tasks without clearing such actions with Tripp, he made no effort to describe Hughes' duties after Coker's arrival. Conversely, it is undisputed that from November 1976 until Respondent San Juan's closure, Hughes had been working as a mechanic and as a line worker in repack. Once Respondent Bellingham took over, Hughes had continued doing mechanics' work. He denied possessing any supervisory authority. I find, based upon the record as a whole, that Hughes is not a supervisor.

2. The Employee Complement

As found above, when Respondent Bellingham opened on April 4, all of the plant and farm shop maintenance employees who had been working for Respondent San Juan continued working as employees of Respondent Bellingham. There were 18 such employees: Greg DePraw, Jack DePraw, Clint DeFries, George Stucks, Richard Alaniz, Don Whitener, Mark Likkel, Elmer Beck, Clarence Estrabrook, Melvan Trueman, Ken Kliendel, Ray Sande, Horace "Jack" Hughes, Clay Nieuwendorp, Henry Jorissen, M. W. Eggert, Russ

Wilson and Mark Hertel.19/ By the time of the strike, four employees had been

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19/ This analysis of the unit complement is based upon a series of lists and payroll records, no one of which is so self-contained that it may be relied upon, by itself, to compare the identities of employees employed by both Respondents. In fact, as is to be expected where so many names are involved, some of the information contained on one list is omitted from other lists upon which it should appear. For example, Respondent Bellingham provided a list of names of employees which it had employed in the historic unit at Squalicum Fill after commencing operations there (General Counsel's Exhibit No. 12). Yet, comparison of that list with Respondent Bellingham's payroll records discloses that some names -- i.e., Donald Dalseg, Ralph Dalseg, Jr., Jeff Ovenell -- were omitted from the list. Similarly, while General Counsel's Exhibit No. 4 is a list of employees and their lengths of employment at Squalicum Fill, without regard to the identities of their employers, the names of neither Clay Nieuwendorp nor Henry Jorissen appear on that list, although there is no dispute that the former had been employed there since 1974 and the latter since

added to unit jobs: Linda Pennington and Jack De Praw, Jr., both of whom had worked for Respondent San Juan, and Larry Brown and David Baldie, neither of whom had worked for Respondent San Juan. During the period ending May 30, the payroll period during which the strike had commenced, Respondent Bellingham employed four additional employees, two of whom (Chuck Larson and Mark Howard) had formerly worked for Respondent San Juan, and two of whom (Jim Ovenell and Michael or Mark Brown) had never worked for Respondent San Juan. Additionally, it was apparent during this payroll period that Jack Du Praw, Jr., David

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(footnote 19 continued)

1973 and notwithstanding the fact that both had been working there at the time of transfer of the operations between Respondents.

Baldie and Larry Brown terminated their employment with Respondent Bellingham. Consequently, by the end of the payroll period ending May 30, there were 23 employees, counting the strikers, in the unit, only two of whom had never worked for Respondent San Juan.

During the month of June, Respondent Bellingham hired 14 employees, most of them as strike replacements, who had never worked for Respondent San Juan: Charles Crandell, Merle Ruschmann, Ray Hull, Donald Dalseg, George Eberlein, Frank Monks, Arnold Fohn, Robert Flaherty, Dale Dykslerhuis, Ralph Dalseg, Jr., Larry Schroeder, Wendy Tripp, Steve Brown and Jeff Ovenell. In addition, Kay Ecalbarger, who had worked as repack supervisor for Respondent San Juan, also was hired in the nonsupervisory line supervisor capacity. Thus, by June 25,

Respondent Bellingham's employment complement consisted of 38 employees, 22 of whom had been employed formerly by Respondent San Juan.20/

In July, two events of significance for the employee complement occurred. First, Respondent Bellingham assumed control of the repack operation and hired almost all of the employees who had been performing that function for Respondent San Juan. Second, pea processing commenced. Thus, during the

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20/ Even if the strikers had been economic strikers, their replacement would not remove them from the unit for purposes of computing the Union's continuing majority status. C. H. Guenther & Son, Inc., d/b/a/ Pioneer Flour Mills, 174 NLRB 1202 (1969), enfd. 427 F.2d 983 (C.A. 5, 1970); James W. Whitfield, d/b/a Cutten Supermarket, 220 NLRB 507, 509 (1975.)

payroll period ending July 9, an addition[al] 19 unit employees were hired by Respondent Bellingham, most for repack operations. Eleven of them (Jim Yanke, Elmer Lee, Jim Britt, Keland Freyseth, Laura Currier, Jim O'Laire, Gavin Graham, Wands Schaff, Frances Kildall, Robert Hamm and Margaret Parks) had been employees of Respondent San Juan. Dean Haskins, Karl Bynon, Curt Christofferson, Greg Christofferson, John Highet, Richard or Allen Curtis, Margaret Rienstra and Ernest Lashua had not. By the end of the payroll period ending July 23, 21 employees (Debra Muder, Vera Garrison, Carol Gustafson, Ken Larson, Pam Berry, Aleta Roberts, Betty Backstrom, Mary Costello, Donna Stedman, Marsha Cowles, Terry Hayes, Melanie Marshall, Clarence Beaty, Liza Webster, Ron Kellas, Andrea Botholick, Linda Hinton, Virginia

Mattingly, Steve Zubalik, Steve Oiness and Ron Knemeyer) who had worked for Respondent San Juan were hired. In addition, 12 employees (Darrell Robb, William Massar, Brent Hansey, William Anderson, Tom Entriken, Greg Rolfe, Gordon Leistiko, Barbara Bennett, Ann Henderson, Dale VanDyke, James Johnson and Debra Hill) who had never worked previously at Squalicum Fill had also been hired. Consequently, by the end of the payroll period of July 23, there were a total of 90 employees, counting the strikers, employed in the unit, 54 of whom had been part of the employee complement of Respondent San Juan.

The number of employees, counting strikers, who had formerly been employed at Squalicum Fill continued to exceed the number of those who had not during the payroll period ending August 6, with

the number of the former being 84 and the number of the latter being 79. Not until the payroll period ending August 20, almost 5 months after Respondent Bellingham had commenced operations at Squalicum Fill, did the absolute payroll number of employees not formerly employed there exceed the number of those who had been employed there formerly (106 of the former and 82 of the latter employed during this payroll period).21/

21/ The records produced for the payroll periods after July show only the identities of employees employed during each period, without disclosing the dates within those periods when they were actually employed. Assuming the accuracy of the dates recorded on General Counsel's Exhibit No. 12, see footnote 19 supra, it is plain that not all of these employees were employed simultaneously during these payroll periods. For example, during the period August 7 through 20, 11 employees who had never worked previously at Squalicum Fill until hired by Respondent Bellingham

G. Discussion

In their briefs, all of the parties have addressed the question of the point at which the "full complement of employees" had been hired by Respondent Bellingham, based upon the "standard"22/ enunciated

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(footnote 21 continued)

either quit or were fired (Richard or Allen Curtis, Sandra Martin, Susan Wheeler, Dawn Stairs, Charlotte Cross, John Card, John Marvin, Mark Warren, Marjorie Kleinbacker, Darlene Randmel, and Constance Burke). In addition, Gavin Graham, Debra Muder and Steve Zubalik, all of whom had worked for Respondent San Juan, also departed Respondent Bellingham's payroll during that 14 day period. Consequently, simple reliance on the records produced for the post-July 23 payroll periods will not suffice to make an accurate comparison of employees previously employed at Squalicum Fill with those never employed there prior to commencing work for Respondent Bellingham, on a day-to-day basis.

22/ Pacific Hide & Fur Depot, Inc. v. N.L.R.B., 553 F.2d 609, 612 (C.A. 9, 1977).

by the Supreme Court in N.L.R.B. v. Burns International Security Services, I c., et al., 406 U.S. 272, 295, 92 S.Ct. 1571, 1586 (1972). Consequently, before examining the question of Respondent Bellingham's obligation to bargain with the Union, a threshhold (sic) determination must be made regarding the nature of the employee-complement at Squalicum Fill.

On April 4, Respondent Bellingham commenced operations there using the identical employee complement as Respondent San Juan had been using when it ceased operations on April 1, save for the repack employees who had continued to perform their duties for Respondent San Juan. Later, however, virtually all of these employees became employees of Respondent Bellingham when it assumed control of the repack phase of the

facility. Consequently, Respondent Bellingham, both at the time that it commenced operations at Squalicum Fill and, again, at the time that it took over repack operations had resorted to Respondent San Juan's complement to staff its newly-acquired operations.

Respondent Bellingham, however, argues that this should not end the inquiry inasmuch as, the unit being a combined seasonal and nonseasonal one, the composition of the seasonal employee complement, as well as that of the nonseasonal complement, must be considered. This, of course, is a valid observation. However, in doing so, account must be taken of the peculiar nature of seasonal employees with relation to the definition of "employee" under Section 2(3) of the Act. Under that definition, the term "employee" is to be construed broadly.

Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 191-192 (1941). Thus, it encompasses not only persons who are actually working, but also "members of the active work force available for hire," Allied Chemical & Alkali Workers of America, Local Union No. 1, et al. v. Pittsburgh Plate Glass Company, Chemical Division, 404 U.S. 157, 168, 92 S.Ct. 383, 392 (1971), and includes "persons on temporary or limited absence from work . . . ." Id., 404 U.S. at 172, 92 S.Ct. at 394.

More specifically with regard to seasonal employees, where there has been a policy of recalling those who have been laid off in the past seasons, the Board, with Court approval, has classified them, when on layoff status, as employees who possess a reasonable expectancy of recall, with the result that the employer-employee relationship has been deemed to

continue during the periods between seasons. George C. Averill, et al., 13 NLRB 411, 421-422 (1939); Saginaw Dock & Terminal Company, 23 NLRB 630, 633-634 (1940); Mario Mercado E Hijos d/b/a Central Rufina, 92 NLRB 1509 (1951). "In view of the seasonal nature of the respondent's business and the respondent's policy of recalling employees who have been laid off, we are of the opinion that the employees who were laid off retained their employee status . . . ." (Footnote omitted.) Marlin-Rockwell Corporation, 19 NLRB 648, 655 (1940), enfd. as modified on other grounds, 116 F.2d 586, 588 (C.A. 2, 1941), cert. denied, 313 U.S. 594 (1941). In the instant case, the practice for a decade prior to Respondent Bellingham's commencement of operations at Squalicum Fill had been to look first to the employees who

had been employed during the preceding seasons as the source of employees for the then-current seasons, with the result that over 100 of the employees on the 1976 seniority list had worked at Squalicum Fill for at least two seasons prior to the 1977 processing season. In these circumstances, I find that the employees on the 1976 seniority list had a reasonable expectancy of recall during the time that Respondent San Juan operated the processing and packing plant in 1977.

Respondent San Juan, of course, did not continue to operate that facility. Respondent Bellingham took it over and it was "not obligated by the Act to hire any of [Respondent San Juan]'s employees . . . ." Golden State Bottling Company, Inc., et al. v. N.L.R.B., 414 U.S. 168, 184, footnote 6, 94 S.Ct. 414, 425,

footnote 6 (1973). However, a new employer can assume the obligation of hiring those employees. The circumstances presented in the instant case provide an example of such an assumption. Thus, Hayes admitted that Respondent Bellingham had formulated no new plans for staffing the Squalicum Fill facility prior to commencing operations there. On April 4, it had resorted to the employees of Respondent San Juan for that purpose. These two factors are indicative of a similar intent regarding the plans for securing seasonal employees.

That indication is reinforced by Hayes' comments to Eggert on March 16, when he referred to the seasonal employee seniority list and sought consent not to recall "some" of the employees whose names appeared on that list. While the term "some" is indeterminate as to

number, it is "used to indicate that a logical proposition is asserted only of a subclass or certain members of the class denoted by the term which it modifies." Webster's New Collegiate Dictionary, G. & C.Merriam Co., 1977. It is a term of exception and, as such, implies neither a majority nor, for that matter, a significant number. In fact, Hayes did not claim that he had intended his comment of March 16 to refer to more than a few of the employees on the 1976 seniority list, though he did testify regarding this conversation with Eggert. By contrast, during this same conversation, Hayes had made plain that Respondent Bellingham desired to fill the office positions with employees of its own choice. It is thus evident that Hayes had not been reluctant on March 16 to make plain the wide-ranging scope of

Respondent Bellingham's intent to replace employees of Respondent San Juan where it had so intended. The fact that he made this plain regarding the office clericals, whom the Union represented, but did not make a similar broadly-based statement regarding the seasonal employees buttresses the conclusion that the seasonal employees who were to be replaced were considered to be the exception and not, as in the case of the office employees, the rule.

Subsequent events only fortify the conclusion that Respondent Bellingham's pre-takeover intent had been to staff the facility with the former employees of Respondent San Juan, save for the office clericals. When it took over the repack operations, Respondent Bellingham hired virtually all of the employees who had been working there. Furthermore, a

significant number of those on the seniority list applied for continued employment, notwithstanding the admitted change in past practice which had afforded employees on that list personal notification that openings at Squalicum Fill existed and that now was the time to indicate intent to return to work there during the processing season.23/ Significantly, almost every one of the employees on the seniority list who did apply for employment during the 1977 season was hired, including one of the

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23/ Of course, the Union did make application, generally, on behalf of all employees on the seniority list. However, this hardly was of aid to the employees insofar as notice of the change made by Respondent Bellingham, since there is no evidence that they were made aware that they would have to take the initiative to contact Respondent Bellingham to apply for employment. Moreover, the Union's general application was rejected.

six employees who were listed as being inadequate performers. While these events occurred after April, they do shed light upon Respondent Bellingham's intent as it existed at the time of the takeover. First, they show that in using the term "some," Hayes had been acknowledging that only a minority of the employees on the seniority list were so inadequate that Respondent Bellingham would prefer not to employ them.24/ Second, they confirm what Hayes' comments

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24/ While it might have been argued that more employees on the seniority list would have been precluded from consideration of employment with Respondent Bellingham had more of them applied, no such argument was advanced and no evidence exists to support such a contention. Consequently, no such finding is possible.

of March 16 implicitly acknowledged: That, as a practical matter, the employees of Respondent San Juan, including the seasonal employees, would be the primary source for Respondent Bellingham's staffing needs, so long as such employees were available. Finally, no evidence of any business need was presented to show that a change in procedure for securing seasonal employees was necessitated. Thus, there is no evidence showing that the change which Respondent Bellingham did make was needed to revive a "moribund business." Burns International Security Services, supra, 406 U.S. at 287, 92 S.Ct. at 1582.

In sum, a preponderance of the evidence shows that as of April 4, it was reasonable to presume and Respondent Bellingham did, in fact, assume that it would be relying upon the 1976 seniority

list as its primary and initial source for seasonal employees, as had been the practice for a decade at Squalicum Fill. Only later, when the Union's counter-proposal showed that it would not consent to exclusion of the seasonal employees from contractual coverage for "at least a year" and that the Union would not abandon its 7-1/2 cents-per-hour pension contribution on behalf of seasonal employees, did Respondent Bellingham abruptly change direction and challenge the Union's status as bargaining representative for the seasonal employees. However, by this time, Respondent Bellingham's own conduct had demonstrated its intent to hire all but "some" of the seasonal employees on the 1976 seniority list. The fact that it may have had second thoughts in light of the Union's position on the terms of a collective

bargaining agreement hardly provides justification for a change in the status of these employees. To the contrary, having accepted the obligation to adhere to past hiring practice, Respondent Bellingham had accepted the obligation to hire these employees, save for "some" of them, once the processing season began. Accordingly, as had been their status with Respondent San Juan, the employees on the 1976 seniority list became employees of Respondent Bellingham, within the meaning of Section 2(3) of the Act, on layoff status with an expectancy of recall once the processing season commenced.

It is true that the Board and the Courts have looked normally to the number of employees actually working to ascertain whether there is an identity of employee-complement in successor

situations. The instant case, however, differs from those cases in that here, there is a seasonal industry and a unit including seasonal employees, with the change in the employer occurring between seasons when the full complement could not be working. Consequently, there are significant differences between the employing industry in the instant case and the employing industries involved in the successorship cases which the Board and the Courts have ruled upon.

This difference in the nature of the employing industries is a significant consideration in successor cases. "Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its evolution, emphasis on the facts of

each case as it arises is especially appropriate." Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, 417 U.S. 249, 246, 94 S.Ct. 2236, 2240 (1974).25/ The importance of doing

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25/ Although Howard Johnson involved the development of common law under Sec. 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185, the Court made plain that application of its policies enunciated therein to the Act was not precluded, for it "would be plainly inconsistent with this view to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under Sec. 301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the Union presses its claims." (Footnote omitted.) Id., 417 U.S. at 256, 94 S.Ct. at 2240.

so is based upon the object which the successorship doctrine seeks to achieve. "It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace." N.L.R.B. v. Colten, et al., 105 F.2d 179, 181 (C.A. 6, 1939). This being the object, it would hardly be consistent to simply treat all industries identically and to ignore unique problems posed for staffing in those which are seasonal.

Indeed, the Supreme Court has acknowledged the possibility of situations where "it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."

Burns International Security Services, Inc., supra, 406 U.S. at 295, 92 S.Ct. 1586. Since, as found above, Respondent Bellingham did intend to retain all but "some" of the seasonal employees and made no plans to replace the nonseasonal plant and farm shop maintenance employees who resumed work at Squalicum Fill on April 4, the instant case provides an illustration of the above-quoted situation.

Lest this conclusion give rise to concern regarding the ability of new employers to change personnel in an effort to revive the economic viability of "moribund" businesses, it should be pointed out that such concern is unwarranted. As it did with respect to the office employees, Respondent Bellingham could have made plain from the outset that it intended not to resort to the 1976 seniority list to staff the seasonal

complement. Instead, it adopted that list as its basic source for obtaining all but "some" of those employees. Moreover, while its owners had discussed changes in operations at Squalicum Fill prior to the takeover, there is no evidence that any consideration was afforded to changing the complement that was to be employed there prior to April 4. Consequently, it can hardly be argued with any persuasion that the employee complement as a group had been considered by Respondent Bellingham's owners as being responsible, even in part, for the economic difficulties which Respondent San Juan had encountered. In short, Respondent Bellingham's defense regarding the uncertainty of the identity of the "full complement" is no more than an afterthought, designed to fit itself into successorship situations where

changes had been planned prior to the takeover. The facts, however, lend no support to any contention that such changes in the employee-complement had been anticipated prior to the change in ownership. See D.R.C., Incorporated, et al., 233 NLRB No. 201, slip op. JD at 23-24 (1977).

To the contrary, aside from the narrow question of whether Respondent Bellingham's conduct provided a basis for finding that it planned to retain the employees in the unit, it would appear that by its conduct, Respondent Bellingham extended recognition to the Union. While it never stated expressly that it was recognizing the Union, specific words are not needed to conclude that recognition had been granted based upon the employer's conduct. Broadmoor

Lumber Company, 227 NLRB No. 144, slip op. JD at 25-28 (1977).

The Union had been the historical representative of the employees in a combined seasonal and nonseasonal unit. Hayes had contacted the Union in that capacity and had arranged for a meeting to ascertain the terms of its collective-bargaining agreement with Respondent San Juan. Since it was unlikely that he was simply wasting time engaging in an academic exercise, the only inference that can be drawn from his effort to obtain this information is that Respondent Bellingham acknowledged that it would be obliged to deal with the Union as the representative of the employees once it commenced operating the facility. At this meeting, Hayes did not dispute the Union's representative status and stated no reservations or restrictions

on continued recognition of the Union as the employees' representative. To the contrary, he proposed a modification of the strict seniority procedure that had been followed with regard to recalling seasonal employees on the seniority list. When Eggert counterproposed that the parties bargain with respect to those whom Respondent Bellingham desired not to recall, Hayes voiced no objection to this procedure and did not challenge the Union's continuing representative status. Instead, he promised to again contact the Union and requested that it furnish him with a copy of the agreement with Respondent San Juan. Although he characterized the discussions as "exploratory talks," he did not contend that he had told this to Eggert. Toltec Metals, Inc. v. N.L.R.B., 490 F.2d 1122, 1124-1125 (C.A. 3, 1974).

The events of April 16 provide further support for the conclusion that Respondent Bellingham had extended recognition to the Union. Thus, at this meeting, Hayes, obviously having reviewed the agreement transmitted earlier to him, discussed some of the substantive terms for an agreement, expressing the opinion that the health and welfare payments would pose no problem, but that the pension contributions for seasonal employees were "ridiculous." While he took the position that Respondent Bellingham did not want to have a contract covering seasonal employees for at least the coming season, at no point did he assert that the Union was not being recognized as the representative of the seasonal employees. Instead, he, in effect, reaffirmed the Union's representational status, by again proposing that

the Union agree that some of these employees be exempted from the normal recall procedure. Again, he voiced no challenge to the Union's representative status when Eggert once more counter-proposed bargaining with regard to the seasonal employees whom Respondent Bellingham believed to be unsatisfactory. At the end, Hayes expressed Respondent Bellingham's position on the type of collective-bargaining agreement that it desired, i.e., one that was not an "industry contract situation," and voiced no reservations when Eggert promised to prepare and transmit an agreement that was tailored to Respondent Bellingham's operation. Only when this proposed agreement was received -- and when it disclosed that the Union would insist upon contractual coverage of seasonal employees and upon the 7-1/2

cents-per-hour pension contributions -- did Respondent Bellingham take the position, for the first time, that the Union was not the representative of the employees. Having already engaged in bargaining with the Union concerning substantive matters, this surely was a somewhat belated challenge to the Union's representative status. Nor, in the circumstances, is it consistent either with the policies which the Act seeks to promote or with the rights accorded employees by the Act. Broadmoor Lumber, supra, slip op. JD at 27.

Therefore, I find that on April 4, when Respondent Bellingham commenced operating the processing and packing plant at Squalicum Fill, the seasonal employees on the 1976 seniority list had become employees of Respondent Bellingham, within the meaning of Section 2(3) of

the Act, on layoff status with a reasonable expectancy of recall. As these employees, as well as the nonseasonal farm shop and plant maintenance employees who commenced working for Respondent Bellingham on that date, had been employed by Respondent San Juan and had been represented by the Union, I find that a majority of the employee complement of Respondent Bellingham at that time had been employed by Respondent San Juan. Inasmuch as it is conceded in Respondent Bellingham's brief that this is the only issue and that all other indicia of successorship status were satisfied, I find that Respondent Bellingham became a successor employer on April 4 and had, as of that date, an obligation to bargain with the Union as the representative of the employees in the combined seasonal and nonseasonal

unit. I further find that, in apparent acknowledgement of that obligation, Respondent Bellingham had, in fact, recognized the Union as the representative of the employees in that unit.

It is conceded that Respondent Bellingham had formulated no changes in employment terms prior to the takeover. Accordingly, by failing to continue observing the terms of employment which had existed prior to April 4, including by failing to continue making trust fund payments and paying the "key employees" premium, and by making changes in coffee-break times, wage rates, procedure for recalling seasonal employees and terms and conditions of employment of seasonal employees, without affording the Union notice and an opportunity to bargain about these changes, Respondent Bellingham violated Section 8(a)(5) and (1) of

the Act. Further, since Respondent Bellingham's refusal to bargain with the Union as the representative of the seasonal employees and its efforts to bargain regarding the nonmandatory subject of the scope of the unit led the employees to engage in strike action on May 16, I find that the strike was an unfair labor practice strike with the result that Respondent Bellingham's refusal to reinstate all of the strikers, following the application for reinstatement made on their behalf, violated Section 8(a)(3) and (1) of the Act. Finally, since Respondent Bellingham's proposals included the nonmandatory subject to the scope of the bargaining unit, I find that Tripp's comment to Likkel, to the effect that the employees would not obtain a contract if they did not accept

Respondent Bellingham's latest proposal, violated Section 8(a)(1) of the Act.

As found above, Respondent San Juan violated Section 8(a)(3) and (1) of the Act by terminating Lillian Huber. Respondent Bellingham, as found above, is the successor employer to Respondent San Juan. Tripp, who implemented the decision to terminate Huber and who committed the independent violations of Section 8(a)(1) of the Act in 1975, was hired as a management official of Respondent Bellingham. Further, during their April 16 conversation, Eggert had told Hayes that there was an unfair labor practice charge pending with regard to the unlawful discharge of one of the office employees. Accordingly, Respondent Bellingham was on notice of the existence of alleged unfair labor practices of its predecessor. In these

circumstances, it is appropriate to hold Respondents jointly and severally liable with respect to the remedy for the unfair labor practices committed by Respondent San Juan. Golden State Bottling Company, Inc. v. N.L.R.B., 414 U.S. 168, 94 S.Ct. 414 (1973).26/ Particularly is this a correct result in the instant case, since the official who

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26/ Inasmuch as Respondent Bellingham has failed to show that it did not adjust its purchase price in the bankruptcy proceeding to take account of its potential backpay liability, a matter peculiarly within Respondent Bellingham's knowledge, there is no basis for finding the Golden State Bottling doctrine inapplicable on that grounds. In any event, it is unlikely that a successor with prior knowledge of the unfair labor practice liability could invoke its own failure to so adjust the purchase price as a means of evading liability for remedying a predecessor's unlawful conduct.

committed the violations of Section 8(a)(1) in 1975 and who implemented Respondent San Juan's decision to terminate Huber is also general manager of Respondent Bellingham. Consequently, absent a remedy for all unfair labor practices committed by Respondent San Juan, "those employees who have been retained will understandably view their job situations as essentially unaltered." Id., 414 U.S. at 184, 94 S.Ct. at 425.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondents, as set forth above, occurring in connection with their operations, described in section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead, and have led,

to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Bellingham Frozen Foods, a Division of San Juan Packers has, at all times material, been an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.27/

2. Bellingham Frozen Foods, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in

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27/ Although the business operations of Respondent San Juan have ceased at Squalicum Fill and it is apparently only a shell, it was still involved in bankruptcy proceedings at the time of the hearing and accordingly, was still in existence at that time.

commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

4. By Interrogating employees regarding their sympathies toward and activities on behalf of the Union, by telling an employee that she would be and was being laid off because it believed her to be the instigator of the Union's organizational campaign, and by telling employees that top management officials would be angry with them for seeking representation, that these officials would fight the Union all the way, that

employees' wages and hours would be reduced if they selected the Union as their representative, that they were being subjected to more stringent working conditions because they had selected the Union as their representative, and that it would reduce working hours in such a manner that employees would be forced to quit because they had selected the Union as their representative, Bellingham Frozen Foods, a Division of San Juan Packers, violated Section 8(a)(1) of the Act.

5. By telling employees that there would be on contract unless they accepted a proposed collective-bargaining agreement that changed the scope of the historic bargaining unit for which the Union had been recognized as the bargaining representative, Bellingham Frozen

Foods, Inc., violated Section 8(a)(1) of the Act.

6. By terminating Lillian Huber on September 19, 1975, and by refusing to reinstate her thereafter, Bellingham Frozen Foods, a Division of San Juan Packers, violated Section 8(a)(3) and (1) of the Act.

7. By failing to reinstate unfair labor practice strikers Marvin W. Eggert, Clarence Estabrook, Marcellus Hertel, Horace "Jack" Hughes, Henry Jorissen, Ken Kleindel, Clayton Neiuwendorp, Ray Sande, Melvan H. Trueman and Russell Wilson, Bellingham Frozen Foods, Inc.,

violated Section 8(a)(3) and (1) of the Act.28/

8. A unit appropriate for collective bargaining is:

> All employees performing work in Bellingham Frozen Foods, Inc.'s processing plants and warehouses located in Bellingham, Washington, or in sheds or lots adjacent thereto where commodities or materials are processed or stored, except: office employees; superintendents; foremen having the power to hire and discharge; regular weighmasters and fieldmen; and other employees who are excluded from the historical bargaining unit, except as provided in Article IX, Section 9 of the 1976-1979 collective-bargaining agreement between General Teamsters, Warehouse, Food Processing & Cannery

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28/ In light of this conclusion, I find it necessary to pass on the added allegation that by failing to confer with the Union regarding the strikers to be reinstated, Respondent Bellingham also violated Section 8(a)(5) of the Act.

> Workers & Public Employees Local Union No. 231, International Brotherhood of Teasmters, Chauffeurs, Warehousemen and Helpers of America, and Bellingham Frozen Foods, a Division of San Juan Packers. The bargaining unit work hereunder includes all work done by or for Bellingham Frozen Foods, Inc., on or about the premises and of a nature customarily performed by bargaining unit members, to the exclusion of any extension by third-party contractors, or their bargaining units, to work other than that specifically contracted for.

9. At all times material, General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America has been the exclusive collective-bargaining representative of the employees in the above described unit within the meaning of Section 9(a) of the Act.

10. By refusing to continue recognizing General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the representative of the employees in the appropriate bargaining unit set forth in Conclusion of Law No. 8 above, by insisting on a change in that historic bargaining unit so that its scope would be narrowed to exclude seasonal employees, by discontinuing and changing existing terms and conditions of employment -- including payments to benefit funds, premium payments to "key employees," coffeebreak periods, wage rates, recall procedure for seasonal employees and terms and conditions of employment for seasonal employees -- without affording General Teamsters,

Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America prior notification and an opportunity to bargain concerning these discontinuances and changes, Bellingham Frozen Foods, Inc., violated Section 8(a)(5) and (1) of the Act.

The Remedy

Having found that Bellingham Frozen Foods, a Division of San Juan Packers, and that Bellingham Frozen Foods, Inc., have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and that they take certain affirmative action to effectuate the policies of the Act.

Bellingham Frozen Foods, Inc., will be required to offer Lillian Huber,

Marvin W. Eggert, Clarence Estabrook, Marcellus Hertel, Horace "Jack" Hughes, Henry Jorissen, Ken Kleindel, Clayton Neiuwendorp, Ray Sande, Melvan H. Trueman and Russell Wilson immediate reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, dismissing, if necessary, anyone who may have been assigned or hired to perform the work which Huber had been performing prior to September 19, 1975, and to perform the work which Eggert, Estabrook, Hertel, Hughes, Jorissen, Kleindel, Neiuwendorp, Sande, Trueman and Wilson had been performing prior to the time that the unfair labor practice strike commenced on May 16, 1977. Additionally, Bellingham Frozen Foods, Inc., will be required

to make whole these 10 unfair labor practice strikers for any loss of earning they may have suffered by reason of its failure to reinstate them, with the backpay period to commence on June 24, 1977,29/ and, further, will be required, jointly and severally with Bellingham Frozen Foods, a Division of San Juan Packers, to make Huber whole for any loss of earnings she may have suffered by reason of her unlawful termination. Backpay is to be computed on a quarterly basis, making deductions for interim earnings, and with interest to be paid on the amounts owing and to be computed in the manner prescribed in F. W. Woolworth, 90 NLRB 289 (1950) and Florida Steel Corporation, 231 NLRB No. 117 (1975);

29/ Eagle International, Inc., 223 NLRB 29 (1976); Drug Package Company, Inc., 228 NLRB No. 17, slip op. at 22 (1977).

see generally Isis Plumbing & Heating Co., 139 NLRB 716 (1962), enforcement denied on different grounds, 322 F.2d 913 (C.A. 9, 1963).

Because Bellingham Frozen Foods, Inc., unilaterally discontinued certain terms and conditions of employment and made unilateral changes in other terms and conditions of employment, I shall also recommend that it be ordered to reinstate those terms of employment which existed at the time that Bellingham Frozen Foods, Inc., commenced operating the Squalicum Fill processing and packing plant as are requested by General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen

and Helpers of America30/ and that it make the employees whole for any losses of benefits which would have accrued to them under those terms of employment which are reinstated, with interest to be paid on these amounts in the manner prescribed above.

Furthermore, the effect of Bellingham Frozen Foods, Inc.'s unilateral change in the procedure for recalling seasonal employees during the 1977 season was, at least potentially, to have precluded

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30/ Absent such a request, and to avoid use of the Board's processes to deprive employees of a benefit already conferred (such as increased wages), this is not to be construed to require Bellingham Frozen Foods, Inc., to rescind such benefits as were granted. See, e.g., Steel-Feb, Inc., 212 NLRB 363, footnote 1 (1974); Great Western Broadcasting Corporation d/b/a KXTV, 139 NLRB 93, 96 (1962).

from recall employees on the 1976 seniority list who would otherwise have responded affirmatively to the inquiry notices normally sent to employees on the preceding year's seniority list and, at least potentially, to have delayed the recall of other employees whose seniority ranking might otherwise have entitled them to earlier recall had the traditional practice of recalling seasonal employees been observed in 1977. Since the 1977 season has ended, no reinstatement order is warranted with respect to these employees, with the possible exception of employees who may, by the end of the 1977 processing season, have attained comparative seniority ranking sufficient to confer upon them the prerogative of requesting nonseasonal positions, for example in repack. To the extent that it is determined in the compliance state

of this proceeding that such employees did exist, Bellingham Frozen Foods, Inc., will be required to offer them reinstatement to such positions, dismissing, if necessary, anyone who may have been assigned or hired to perform the work that these employees would otherwise have performed. Moreover, with respect to these employees, if any, and with respect to all other employees on the 1976 seniority list who it is determined in compliance would have been recalled or would have been recalled earlier than they were but for the unlawful unilateral change in recall procedure, Bellingham Frozen Foods, Inc., will be required to make them whole for any loss of earnings they may have suffered as a result of that unilateral change, with interest to be paid on

the amounts of backpay owing and to be computed as set forth above.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:31/

ORDER

Bellingham Frozen Foods, a Division of San Juan Packers, its officers, agents, successors and assigns, shall:

31/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Interrogating employees concerning their union sympathies and activities, telling employees that they will be and are being laid off because they are believed to be instigators of union organizational campaigns, and telling employees that top management officials would be angry with them for seeking representation, that these officials would fight unionization, that employees' wages and hours will be reduced if they select union representation, that employees are being subjected to more stringent working conditions because they selected union representation, and that employees' working hours are to be reduced to the point where they will be forced to quit because they selected union representation.

(b) Discharging or otherwise discriminating against employees with regard to their hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activity protected by Section 7 of the Act.

(c) In any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Jointly and severally with Bellingham Frozen Foods, Inc., make Lillian Huber whole for any loss of pay she may have suffered as a result of the discrimination practiced against her on

September 19, 1975, in the manner set forth above in the section entitled "The Remedy."

(b) Preserve and make available to the Board or its agents all payroll and other records necessary to compute the backpay and reinstatement rights set forth in "The Remedy" section of this Decision.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Bellingham Frozen Foods, a Division of San Juan Packers, has taken to comply herewith.

Bellingham Frozen Foods, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Telling employees that there will be no collective-bargaining

agreement unless they accept a proposed agreement that excludes seasonal employees from the scope of the historic bargaining unit.

(b) Refusing to reinstate, upon application, unfair labor practice strikers or otherwise discriminating against employees with regard to their hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activity protected by Section 7 of the Act.

(c) Refusing to recognize and bargain collectively with General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of the employees in the

appropriate bargaining unit set forth in Conclusion of Law No. 8, above.

(d) Insisting on the exclusion of seasonal employees from the recognized historic appropriate bargaining unit set forth in Conclusion of Law No. 8, above.

(e) Discontinuing or changing terms and conditions of employment of employees in the appropriate bargaining unit described in Conclusion of Law No. 8, above, without first giving notice to and affording General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America an opportunity to bargain about discontinuing or changing those terms and conditions of employment.

(f) In any other manner interfering with, restraining or coercing

its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Lillian Huber immediate and full reinstatement to her former position of employment, dismissing, if necessary, anyone who may have been hired to perform the work that she had been performing prior to September 19, 1975, or, if her former position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and, jointly and severally with Bellingham Frozen Foods, a Division of San Juan Packers, make her whole for any loss of pay she may have suffered as a result of the discrimination, in the

manner set forth above in the section entitled "The Remedy."

(b) Offer Marvin W. Eggert, Clarence Estabrook, Marcellus Hertel, Horace "Jack" Hughes, Henry Jorissen, Ken Kleindel, Clayton Neiuwendorp, Ray Sande, Melvan H. Trueman and Russell Wilson immediate and full reinstatement to their former positions of employment, dismissing, if necessary, anyone who may have been hired to perform the work which they had been performing prior to commencement of the unfair labor practice strike on May 16, 1977, or, if any of their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of the failure to reinstate them upon the application

filed on their behalf on June 24, 1977, in the manner set forth above in the section entitled "The Remedy."

(c) Upon request, bargain collectively with General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of all employees employed in the bargaining unit heretofore found appropriate in Conclusion of Law No. 8, above, respecting rates of pay, wages, hours, or other terms and conditions of employment and, should any understandings be reached, embody such understandings in a signed agreement.

(d) Upon request by General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local

Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, reinstate any terms of employment existing on April 1, 1977, when the employees in the bargaining unit heretofore found appropriate in Conclusion of Law No. 8, above, were employed by Bellingham Frozen Foods, a Division of San Juan Packers, and make these employees whole for any losses incurred by them as a result of the unilateral discontinuances and changes in their terms of employment in the manner set forth in the section entitled "The Remedy."

(e) Offer reinstatement to any employee on the 1976 seniority list who would have obtained sufficient seniority ranking during the 1977 processing season to have been entitled to

preference for annual nonseasonal employment, absent the unilateral change in recall procedure for that season, dismissing, if necessary, anyone who may have been assigned to perform the work that such employees, if any, would have performed but for the unilateral change, and make such employees, if any, whole for any loss of pay or benefits they may have suffered as a result of the unilateral change in recall procedure in the manner set forth above in the section entitled "The Remedy."

(f) Make whole all employees on the 1976 seniority list who would have been, but were not, recalled, or who would have been recalled earlier than they were recalled but for the unilateral change in recall procedure for the 1977 processing season, for any resultant loss of pay or benefits they

may have suffered, in the manner set forth above in the section entitled "The Remedy."

(g) Preserve and make available to the Board or its agents all payroll and other records necessary to compute the backpay and reinstatement rights set forth above in the section entitled "The Remedy."

(h) Post at its Bellingham, Washington, processing and packing facility and mail to all employees on the 1976 seniority list and to all employees laid off at the end of the 1977 processing season, copies of the

attached notice marked "Appendix."32/ Copies of the notice, on forms provided by the Regional Director for Region 19, after being duly signed by Bellingham Frozen Foods, Inc.'s authorized representative, shall be posted immediately upon receipt thereof and be maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Bellingham Frozen Foods, Inc., to

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32/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ensure that said notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Bellingham Frozen Foods, Inc., has taken to comply herewith.

DATED: April 5, 1978.

/s/
William J. Pannier III
Administrative Law Judge

A-200

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Act, as amended, gives all employees the following rights:

> To organize themselves;
> To form, join, or support unions;
> To bargain as a group through a representative they choose;
> To act together for collective bargaining or other mutual aid or protection;
> To refrain from any or all such activities except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT interrogate you concerning your smypathies and activities

on behalf of General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT tell you that you will be laid off or terminated because we believe that you started an organizing campaign on behalf of any labor organization.

WE WILL NOT tell you that you have been laid off or terminated because we believe that you started an organizing campaign on behalf of General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT tell you that we will be angry with you for seeking representation by a labor organization.

WE WILL NOT tell you that we will fight General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, which you chose as your representative.

WE WILL NOT tell you that your wages and hours will be reduced if you select General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, as your representative.

WE WILL NOT tell you that you are being subjected to more stringent working conditions because you have selected General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, as your representative.

WE WILL NOT tell you that your working hours will be reduced to the point where you will be forced to quit because you have selected General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, as your representative.

WE WILL NOT tell you that there will be no collective-bargaining agreement with General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, unless our proposal excluding seasonal employees from the historic bargaining unit is accepted.

WE WILL NOT discharge or otherwise discriminate against you with regard to your hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

America, or any other labor organization, or for engaging in activity protected by the National Labor Relations Act.

WE WILL NOT refuse to reinstate unfair labor practice strikers upon receipt of their unconditional application for reinstatement or upon receipt of such an application made on their behalf by General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT refuse to recognize and bargain collectively with General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, as the collective-bargaining representative of:

> All employees performing work in Bellingham Frozen Foods, Inc.'s processing plants and warehouses located in Bellingham, Washington, or in sheds or lots adjacent thereto where commodities or materials are processed or stored, except: office employees; superintendents; foremen having the power to hire and discharge; regular weighmasters and fieldmen; and other employees who are excluded from the historical bargaining unit, except as provided in Article IX, Section 9 of the 1976-1979 collective-bargaining agreement between General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Bellingham Frozen Foods, a Division of San Juan Packers. The bargaining unit work hereunder includes all work done by or for Bellingham Frozen Foods, Inc., on or about the premises and of a nature customarily performed by bargaining unit members, to the exclusion of any extension by third-party contractors, or their bargaining units, to

work other than that specifically contracted for.

WE WILL NOT insist upon the exclusion of seasonal employees from the above-described appropriate bargaining unit.

WE WILL NOT discontinue or change terms and conditions of employment of employees in the above-described appropriate bargaining unit, without first giving notice to and affording General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America an opportunity to bargain about discontinuing or changing those terms and conditions of employment.

WE WILL NOT in any manner interfere with any of your rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL, as a successor employer, offer Lillian Huber immediate and full reinstatement to her former position, dismissing, if necessary, anyone who may have been hired or assigned to perform the work which she had been performing prior to the time that she was terminated on September 19, 1975, or, if her former position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and, jointly and severally with Bellingham Frozen Foods, a Division of San Juan Packers, make her whole for any loss of pay she may have suffered as a result of the discrimination practiced against her by Bellingham Frozen Foods, a Division of San Juan Packers.

WE WILL offer unfair labor practice strikers Marvin W. Eggert, Clarence

Estabrook, Marcellus Hertel, Horace "Jack" Hughes, Henry Jorissen, Ken Kleindel, Clayton Neiuwendorp, Ray Sande, Melvan H. Trueman and Russell Wilson immediate and full reinstatement to their former positions, dismissing, if necessary, anyone who may have been hired or assigned to perform the work which they had been performing prior to the time that they commenced striking or, if any of their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of our failure to reinstate them on June 24, 1977, when an application for their return to work was received.

WE WILL, upon request, bargain collectively with General Teamsters,

Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the collective-bargaining representative of the employees in the unit described above respecting rates of pay, wages, hours of employment, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, upon request by General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local Union No. 231, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, reinstate any terms of employment existing when we took over the processing and packing facility at Squalicum Fill for the

employees in the above-described appropriate bargaining unit and make whole the employees in that unit for any losses sustained as a result of our discontinuances or changes in those terms of employment.

WE WILL offer reinstatement to any employees on the 1976 seniority list who would have obtained sufficient seniority ranking during the 1977 processing season to have been entitled to preference for annual nonseasonal employment, absent our unilateral change in the recall procedure for that season, dismissing, if necessary, anyone who may have been assigned to perform the work that such employees, if any, would have performed but for that change, and make such employees, if any, whole for any loss of pay or benefits they may have

suffered as a result of the change in recall procedure.

WE WILL make whole all employees on the 1976 seniority list who would have been, but were not, recalled or who would have been recalled at a time earlier than they were recalled, but for the unlawful change in recall procedure for the 1977 processing season, for any loss of pay or benefits they may have suffered as a result of that change.

BELLINGHAM FROZEN FOODS, INC.
(Employer)

Dated _____ By _____
(Representative)(Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of

posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building - Rm. 2948, 915 Second Ave., Seattle, WA 98174 Telephone Number: (206) 442-7472.

No. 80-735

In the Supreme Court of the United States

OCTOBER TERM, 1980

BELLINGHAM FROZEN FOODS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether the Board properly found that a successor employer was obligated to recognize the union when, prior to the takeover, the successor employer made it "perfectly clear" that it planned to retain all of its predecessor's employees in the bargaining unit.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 1

Argument 7

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Int'l Assoc. of Machinists and Aerospace Workers, AFL-CIO v. *NLRB*, 595 F. 2d 664, cert. denied, 439 U.S. 1070, affirming *Boeing Co.*, 214 N.L.R.B. 541 9

NLRB v. *Burns International Security Services, Inc.*, 406 U.S. 272 7

Spruce Up Corp., 209 N.L.R.B. 194, enforced, 529 F. 2d 516 9

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 7

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

Section 8(a)(1), 29 U.S.C. 158(a)(1) 5

Section 8(a)(3), 29 U.S.C. 158(a)(3) 5

Section 8(a)(5), 29 U.S.C. 158(a)(5) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-30) is reported at 626 F. 2d 674. The decision and order of the National Labor Relations Board (Pet. App. A-33 to A-213) are reported at 237 N.L.R.B. 1450.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1980 (Pet. App. A-30). A petition for rehearing was denied on September 26, 1980 (Pet. App. A-31 to A-32). The petition for a writ of certiorari was filed on November 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at pages 2-3 of the petition.

STATEMENT

1. Bellingham Cold Storage (a different corporation from petitioner) has leased a frozen food packing plant to a succession of food processing firms (Pet. App. A-2, A-60 to A-61). The workforce at the plant consists of nonseasonal employees and a number of seasonal employees depending on the vegetable processing season (Pet. App. A-3 to A-4, A-64 to A-65). Under each of the lessees, the plant traditionally has maintained a seniority list of seasonal employees, and has recalled the seasonal employees in the order of their seniority when it needs additional processing employees (Pet. App. A-4 to A-5, A-67 to A-70). For many years, the General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local 231 ("the Union") represented the lessees' production and maintenance employees—both seasonal and nonseasonal (Pet. App. A-5 to A-6, A-65 to A-67).

In February 1977,[1] San Juan Packers, Inc., the third lessee of the plant, filed a petition in bankruptcy (Pet. App. A-2, A-61). On March 16, petitioner's president, Gordon Hayes, met with a representative of the Union, Marvin Eggert, and informed him that petitioner was in the process of purchasing San Juan's operations. When Eggert confirmed that the Union represented the production and maintenance employees, Hayes stated that there were some employees on the seasonal seniority list that petitioner might not want to hire because of their inadequate performance (Pet. App. A-92 to A-93).

Petitioner purchased San Juan's assets and leasehold on April 1, and began its own operations on April 4 (Pet. App. A-61 to A-62). Petitioner continued to operate the plant in the same manner as had San Juan (Pet. App. A-62).[2] It retained all of the unit employees then working for San Juan (except for the repack employees (see note 2, *supra*)), and President Hayes informed them on the morning that petitioner began operations that they would continue to be paid the same wage rates they had received from San Juan (Pet. A-96 to A-97, A-133).

Petitioner maintained virtually all previous working conditions for a week after the takeover. On April 10, however, it instituted unilateral changes in wage rates and break times (Pet. App. A-98 to A-99). During a meeting between Hayes and Eggert on April 14, Hayes stated that

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[1]All events referred to herein occurred in 1977.

[2]After the sale, the Bankruptcy Court permitted San Juan to operate the "repack" portion of the operation until it fulfilled certain outstanding obligations. Petitioner acquired the repack operation in July (Pet. App. A-61 to A-62, A-137).

seasonal employees should not be included in the bargaining unit (Pet. App. A-7, A-99 to A-100). On April 22, Hayes sent a letter to Eggert in which he denied any obligation to bargain with the Union (Pet. App. A-7, A-102 to A-103). However, negotiations continued and, on May 13, petitioner presented the Union with a proposed contract excluding seasonal employees from the bargaining unit. On May 16, the employees went out on strike (Pet. App. A-7 to A-8, A-103 to A-105).

In June, petitioner began hiring seasonal employees. While the past practice had been to call seasonal employees on the seniority list in order of seniority, petitioner merely invited all previous employees to apply for jobs. Petitioner also accepted applications from anyone else who wished to apply for processing work (Pet. App. A-8 to A-9, A-111, A-136). By August 6, petitioner had hired 84 employees who previously had worked for San Juan and 79 new employees. It was not until the payroll period ending August 20 that the new employees outnumbered those employees who had worked for San Juan (Pet. App. A-139 to A-140).

2. The Administrative Law Judge, whose decision was adopted by the Board (Pet. App. A-34 to A-35), found that petitioner was a successor to San Juan in the production and maintenance unit. The ALJ rejected petitioner's contention that it never intended to hire San Juan's complement of seasonal employees and that therefore its status as a successor employer should be determined only as of the time it had hired its full complement of seasonal employees—at which point its predecessor's employees constituted less than a majority of its workforce. Rather, the ALJ found that, when petitioner commenced operations, it intended to resort to the existing seasonal seniority list to staff its

seasonal complement (except for a few individuals who were considered unsuitable) and that it initially recognized the Union as the representative of both the permanent and seasonal employees (Pet. App. A-147 to A-153, A-158 to A-167). It was only after the Union refused petitioner's demands to exclude the seasonal employees from contractual coverage and to abandon its insistence on certain benefits for them that petitioner "abruptly change[d] direction and challenge[d] the Union's status as bargaining representative for the seasonal employees" (Pet. App. A-153). The ALJ explained (Pet. App. A-153 to A-154) that

> [t]he fact that [petitioner] may have had second thoughts in light of the Union's position on the terms of a collective bargaining agreement hardly provides justification for a change in the status of these employees. To the contrary, having accepted the obligation to adhere to past hiring practice, [petitioner] had accepted the obligation to hire these employees, save for "some" of them, once the processing season began. Accordingly, as had been their status with * * * San Juan, the employees on the 1976 seniority list became employees of [petitioner] within the meaning of Section 2(3) of the Act, on layoff status with an expectancy of recall once the processing season commenced.

Accordingly, the Board concluded that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to continue recognizing the Union as the representative of all the seasonal employees in the production and maintenance unit, by insisting on excluding seasonal employees from the contract covering the unit, and by making unilateral changes in unit working conditions. The Board further found that petitioner had violated Section 8(a)(3) and (1) of the Act by refusing the unconditional requests of 10 unfair labor practice strikers to return to their jobs and by telling employees that it would not agree to a contract unless the employees accepted an agreement which excluded seasonal employees from the unit (Pet. App. A-10 to A-11). The Board ordered petitioner, *inter alia*, to bargain with the Union as the exclusive bargaining representative of all the employees in the production and maintenance unit as historically composed, to reinstate any terms of employment that existed on April 1, and to make the employees whole for losses caused by the unilateral changes in working conditions (Pet. App. A-194 to A-195).[3]

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[3]The Board also found that San Juan had violated Section 8(a)(3) and (1) of the Act by discharging a clerical employee because of her union activities, and Section 8(a)(1) by committing other acts that interfered with the clerical employees' statutory right to select the Union as their bargaining representative (Pet. App. A-9 to A-10). The Board ordered petitioner to remedy these unfair labor practices of San Juan (Pet. App. A-192 to A-193).

3. The court of appeals upheld the Board's findings of violations of the Act by petitioner and enforced its order remedying those violations.[4] It found that substantial evidence supported the Board's finding that petitioner intended "to hire a majority of its employees from those who previously worked for San Juan in the production and maintenance unit * * *" (Pet. App. A-17 to A-18). The court stated (Pet. App. A-21 to A-23) that

> [n]ot only was the initial production and maintenance unit composed entirely of former San Juan employees, but San Juan employees also continued to constitute a majority of the unit for a substantial period of time after the takeover. Former San Juan workers were not outnumbered in the unit until the payroll period ending August 20, almost five months after [petitioner] began to operate the plant * * *.
>
> [Petitioner] only challenged the Union's representative status once it became clear from its contract negotiations that the Union would not agree to change the bargaining unit to exclude seasonal employees. By this time [petitioner's] obligation to bargain with the Union had already occurred. That obligation occurred as soon as it was perfectly clear that [petitioner] intended to accept San Juan employees as its own in the production and maintenance unit. In fact, the Board found that [petitioner], in acknowledgment of its obligation to bargain, recognized the Union voluntarily—a finding supported by substantial evidence. [Petitioner's] subsequent actions may not dissolve that obligation to bargain.

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[4]The court denied enforcement of that portion of the Board's order which required petitioner to remedy the unfair labor practices committed by San Juan (note 3, *supra*) (Pet. App. A-26 to A-30). No issue concerning that aspect of the court's order is raised here.

ARGUMENT

1. In *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 294-295 (1972), this Court held that:

> [a]lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

Petitioner challenges (Pet. 10-11) the Board's conclusion, which was upheld by the court of appeals, that it was "perfectly clear" when petitioner commenced operations that it intended to retain both the seasonal and non-seasonal employees. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

In any event, as shown at pages 2-3, *supra*, the Board's findings are amply supported by the record. Prior to the takeover, petitioner's president had told the Union that he would employ all of San Juan's production and maintenance employees except those who were considered to be poor workers; employees were asked to remain in their current positions without having to apply to petitioner for employment; on the morning of the takeover, the employees were assured that they would continue to be paid at the same rates; and pre-takeover working conditions were maintained for a week after the takeover. Petitioner's initial production and maintenance unit was composed entirely of former San Juan employees, and former San Juan employees continued to constitute a majority of the unit for almost five

months after the takeover. Thereafter, almost every seasonal employee on the seniority list who applied for employment was hired.[5]

2. Petitioner contends (Pet. 12-20) that *Burns* requires not only an intention to hire the predecessor's employee complement but an effectuation of that intention; therefore, no bargaining obligation may be imposed on it because, even if it had intended to hire its predecessor's employee complement when it commenced operations, in fact, the predecessor's employees comprised less than a majority of petitioner's ultimate workforce. This contention is without merit.

When petitioner took over San Juan's operation, and for almost five months thereafter, a majority of petitioner's workforce consisted of employees who had worked for San Juan. It was only after petitioner changed its pre-takeover intent and abandoned the decade-long practice of calling seasonal employees from the seniority list in order of seniority that the complement of non-San Juan employees eventually outnumbered the San Juan employees in the unit. But the ALJ, whose findings were upheld by the Board and the court of appeals, found that petitioner abandoned that past practice with respect to recalling seasonal employees not out of "business need," but because it decided, after it had agreed to hire those employees and recognize the Union

---

[5]That only 108 of the 208 employees on the seniority list applied for work with petitioner (Pet. 15) was, as the ALJ found (Pet. App. A-111 to A-112), attributable to petitioner's failure to notify the seasonals, as had been the customary practice.

on their behalf, that it did not want to apply the contract to them (Pet. App. A-152 to A-154, A-34 to A-35, A-21 to A-22). Nothing in *Burns* permits petitioner to avoid a bargaining obligation to the Union in these circumstances.[6]

---

[6] *Int'l Assoc. of Machinists and Aerospace Workers, AFL-CIO* v. *NLRB*, 595 F. 2d 664 (D.C. Cir. 1978), cert. denied, 439 U.S. 1070 (1979), affirming *Boeing Co.*, 214 N.L.R.B. 541 (1972), and *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974), enforced, 529 F. 2d 516 (4th Cir. 1975) (mem.), relied on by petitioner (Pet. 13), are distinguishable from the situation here. In *Boeing, supra*, 214 N.L.R.B. at 541, the Board, upheld by the court of appeals, found that it was not "perfectly clear" that the successor would hire the predecessor's complement of employees because the successor's offer of employment was conditioned on changed working conditions which it was not certain would be accepted by a majority of its predecessor's employees. Similarly, in *Spruce Up, supra*, 209 N.L.R.B. at 195, the Board held that the new employer had no obligation to bargain with the union at the time of the takeover because it was not clear that the predecessor's employees would accept employment under the conditions the employer offered. However, at the point that the employer actually hired a majority of the predecessor's employees, the employer was obligated to bargain with the union because "from that date, the Union had, at the least, a presumption of continuing majority status which [the employer] failed to overcome." *Id.* at 196.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLAIM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
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LINDA SHER
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National Labor Relations Board

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